IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MORRIS SOLOMON, JR.,

Defendant and Appellant.

CAPITAL CASE

CRIM. S029011

Automatic Appeal from the Judgment of the
Sacramento County Superior Court No. 84641
The Honorable Michael J. Virga and Honorable Peter N. Mering, Judges

RESPONDENT'S BRIEF

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MORRIS SOLOMON, JR.,** Defendant and Appellant.	**CAPITAL CASE** CRIM. S029011

STATEMENT OF THE CASE

By information filed June 23, 1988 (12 CT 3457), and amended March 15, 1991 (17 CT 4919), in Sacramento County Superior Court case number 84641, the District Attorney of Sacramento County charged appellant Morris Solomon, Jr. with the following:

(count I) murder of Linda V. (Pen. Code, § 187[1]);

(count II) murder of Sheila J. (§ 187);

(count III) forcible oral copulation with Melissa H. (§ 288a, subd. (c) ["288a(c)"]), with personal use of a deadly or dangerous weapon (knife) (§ 12022.3(a));

(count IV) forcible rape of Melissa H. (§ 261(2)[2]), with personal use of a deadly or dangerous weapon (knife) (§12022.3(a));

(count V) forcible sodomy of Melissa H. (§ 286(c)), with personal use of a deadly or dangerous weapon (knife) (§12022.3(a));

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1. Further undesignated statutory references are to the Penal Code.

2. Currently, section 261(a)(2).

(count VI) forcible oral copulation with Melissa H. (§ 288a(c)), with personal use of a deadly or dangerous weapon (knife) (§12022.3(a));

(count VII) murder of Yolanda J. (§ 187);

(count VIII) murder of Angela P. (§ 187);

(count IX) murder of Maria A. (§ 187);

(count X) murder of Sharon M. (§ 187);

(count XI) forcible rape of Sherry H. (§ 261(2)), with personal use of a deadly or dangerous weapon (shoe lace) (§ 12022(b));

(count XII) murder of Cherie W. (§ 187);

(count XIII) premeditated and deliberated attempted murder of LaTonya C. (§§ 187, 664), with personal use of a deadly or dangerous weapon (shoelace) (§12022.3(a));

(count XIV) assault of LaTonya C. with intent to commit an enumerated sex offense (§ 220), with personal use of a deadly or dangerous weapon (shoelace) (§12022.3(a));

a special circumstance of multiple current murder convictions (§ 190.2(a)(3));

a prior conviction, in 1971 for assault to commit rape (§ 667(a)); and

a prior conviction, in 1977 for assault to commit rape (§ 667(a)). (CT 4919-29.)

On June 24, 1988, appellant pled not guilty and denied the special allegations. (12 CT 3492.)

An initial jury ("guilt phase jury") was sworn on May 28, 1991 (18 CT 5204) and on August 29, 1991, convicted appellant as charged on all counts other than counts VIII, XIII, and XIV.[3/] The guilt phase jury fixed the murders in the first degree in counts II, VII, IX, and X, and in the second degree

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3. The court declared a mistrial on counts VIII, XIII, and XIV. (19 CT 5527; 37 RT 16593.)

in counts I and XII. The guilt phase jury found true the multiple-murder special circumstance. (19 CT 5507-30; 37 RT 16591-93, 16594-16636.)

After a September 11, 1991 waiver of a jury trial on the priors (19 CT 5645; 37 RT 16643-45), the court on September 16, 1991, found the priors true. (19 CT 5650; 37 RT 16710-11.)

After the taking of additional evidence (19 CT 5655-57, 5659), the guilt phase jury failed to reach a verdict on penalty (20 CT 5767-68, 5777-78); on October 1, 1991, the court declared a mistrial on penalty (20 CT 5778).

A second jury ("penalty phase jury") was sworn on May 4, 1992 (21 CT 6209; see 21 CT 6205), and on July 6, 1992, returned a verdict of death (22 CT 6357, 6359).

After briefing by the parties (22 CT 6363-76, 6401-15, 6423-27) with respect to the automatic motion to reduce the penalty from death (§ 190.4(e)), the court on September 15, 1992, denied the motion. (22 CT 6436-41.) On September 16, 1992, the court imposed the penalty of death on counts II, VII, IX, and X. The court imposed an indeterminate term including consecutive terms of 15 years to life on each of counts I and XII. Further, the court imposed a 65-year determinate term, including five consecutive 11-year terms (8 years plus 3-year weapon enhancement, on each of counts III, IV, V, VI, and XI) plus two consecutive 5-year enhancements for the prior convictions. (22 CT 6501-07.) On the prosecution's motion, all remaining charges were dismissed in furtherance of justice (§ 1385). (22 CT 6501.)

This appeal is automatic. (§ 1239(b).)

STATEMENT OF FACTS

A. Introduction

On the morning of June 18, 1986, the body of Yolanda J. was discovered in an abandoned house located at 3445 4th Avenue in the Sacramento suburb

of Oak Park. (18 RT 11019-20, 11038-39; 19 11063-64.) Yolanda had been a prostitute during her life, which had ended several days earlier. The dress on the body was pulled up around the waist. (19 RT 11041-42, 11168.) Evidence indicated Yolanda's arms had previously been bound behind her. (19 RT 11041-43, 11168-73; 22 RT 12129.) Law enforcement's attention quickly focused on appellant, a local handyman employed to do work at the 4th Avenue house. (19 RT 11181-82; 21 RT 11750-51, 11753.) Several police interviews with appellant shortly followed, but appellant was not arrested. (21 RT 11795; 30 Aug. CT ["ACT"] 8821.)

The following month, on July 20, 1986, the body of Angela P. – who had also been a prostitute – was discovered in the basement of an abandoned house at 3200 Sacramento Boulevard in Oak Park. (22 RT 12233; 23 RT 12318-20.) As with the body of Yolanda, the body of Angela was nude from the waist down. (23 RT 12318-20.) In addition, Angela's body was gagged at the mouth and bound at the hands. (23 RT 12321-22.) Angela had last been seen alive several days earlier, in the company of a man (resembling appellant) on a professional "date." (24 RT 12613, 12621-22.)

Months passed without an arrest.

On March 19, 1987, in the backyard of an abandoned house at 2532 19th Avenue, workers digging a ditch discovered a buried body. (24 RT 12716, 12729.) It was the body of Maria A., a prostitute who disappeared several months earlier. (27 RT 12729; 25 RT 13069; 27 RT 13692.) The body was bound in multiple locations. (24 RT 12731-32; 25 RT 13083-85.) The last tenancy in the 19th Avenue house had been shared by a group of several adults and some children; police detectives learned that the appellant had been part of that group. (26 RT 13195, 13199, 13319; 31 RT 14924.)

On April 20, 1987, detectives went to a house at 3233 44th Street – where appellant had resided for a time after his departure from the 19th Avenue

house. The detectives went to this 44th Street residence because appellant had left behind a vehicle when he abandoned the 44th Street residence, and he had given permission for a law enforcement search of the vehicle. (27 RT 13605-07.) At the residence the detectives observed an unusual depression in the back yard. (*Ibid.*) With the property owner's permission, the detectives soon unearthed the body of Cherie W., a prostitute who had disappeared months earlier. Cherie's body was nude from the waist down, but there was no evidence of binding. (27 RT 13604-08, 13616-17, 13620, 13639-40, 13696; 28 RT 13966.)

Two days later, on April 22, 1987, detectives went to the residence at 4327 Broadway, in Oak Park. (On June 18, 1986, the same day of public discovery of Yolanda's body, appellant had been ordered evicted from this Broadway residence.) (See 24 RT 12796; 29 RT 14203, 14259; 30 ACT 8898.) Depressions were visible in the back yard; detectives unearthed the bound bodies of Linda V. and Sheila J. – both prostitutes who had disappeared a year before. (29 RT 14094, 14194-95, 14204-07, 14334; 30 RT 14549, 14578, 14585; 31 RT 14842, 14868-79, 14895-14900, 14909.)

On the evening of April 22, 1987, police arrested appellant. (33 RT 15483; 34 RT 15756-57.)

Six days later, detectives returned to 2532 19th Avenue. This was the prior residence of appellant, where the body of Maria A. had been discovered in March of 1987. (33 RT 15462.) Here, too, a depression was visible in the back yard. (33 RT 15468.) From this depression, the police unearthed the bound body of Sharon M., a prostitute who had disappeared months before. (33 RT 15468-15471, 15521; 34 RT 15542, 15547, 15550.)

The discovery of bodies, and appellant's publicized arrest, led to discovery of additional victims. Upon the discovery of the bodies at 4327 Broadway, LaTonya C., who was a "pimp" for prostitutes (32 RT 15113),

informed the police that appellant had in February 1986 strangled her with a shoelace-type ligature. (32 RT 15132-33.) However, appellant's efforts against LaTonya were frustrated when her struggles allowed her to prevent his strangulation temporarily (32 RT 15134), and the encounter was ultimately interrupted by the arrival of two girls (32 RT 15136).

Sherry H. contacted police after seeing appellant's picture in the newspaper. (33 RT 15260.) Ultimately, Sherry would attest that, while on a professional "date" with appellant in October 1986, appellant strangled her with a shoelace-type ligature. Sherry's fall to the ground frustrated the strangulation, and Sherry (while keeping the ligature from appellant) was able to convince appellant to let her go after having sexual intercourse. (33 RT 15216-37.)

And, police were informed that, on a night just weeks before the discovery of Yolanda J.'s body, appellant was interrupted during an assaultive encounter with Melissa H. – a prostitute who had refused professional "dates" with appellant. Appellant had bound Melissa's hands after forcing her at knifepoint to orally copulate him, and he sodomized her and raped her in that bound condition. Melissa later awakened to find appellant had bound her feet and neck, and he had wrapped her in a quilt. However, appellant fled when Melissa's boyfriend arrived. (33 RT 15276-13; 34 RT 15627-31, 15645.)

B. Guilt Phase Evidence

1. Second Degree Murder Of Linda V. (Count I) And First Degree Murder Of Sheila J. (Count II)

a. Disappearances

(i) Linda V.

Linda V. disappeared first. In January of 1986, Linda's age was 24 years, her height was about 5 feet or 5 feet one inch, and she weighed between

90 and 100 pounds. (30 RT 14127-28; see 4 Aug. Clerk's Transcript (Paper and Photo Exhibits) ["Exh.-ACT"] 1038-41 [Peo.'s Exhs. 510, 511].) She was a prostitute addicted to narcotics. (30 RT 14128.) Linda commonly used heroin, and from time to time she used cocaine and methamphetamine. (31 RT 14827.) For the past few months and up to this point, Linda had resided intermittently at the home of Tammy Zaccardi. (31 RT 14824.) Zaccardi was a heavy user of narcotics who was a friend to Linda, and who kept Linda supplied with more narcotics than Linda's limited funds could otherwise obtain. (31 RT 14817, 14832.) Zaccardi trusted Linda and no one else (31 RT 14857), and Zaccardi "would have given Linda anything she wanted" (31 RT 14853).

However, in January of 1986, Linda stole from Zaccardi about $400 and about 2 ounces of methamphetamine. (31 RT 14834-35.) As a result of a promise of a reward of one gram of heroin for information, Zaccardi learned a few days prior to February 14, 1986, that Linda was outside a store on the corner of the intersection of 14th Street and E Street in midtown Sacramento. (31 RT 14836-37, 14841.) Linda was waiting at the corner for someone (recently, she had not been seen on the street looking for professional "dates"). (31 RT 14837, 14842.) Zaccardi confronted Linda at the corner. (21 RT 14839.) However, Linda's ride then arrived in the form of a cream-colored vehicle being driven by a man in his late 30's or early 40's who looked like appellant. Linda said, "Here[] I am," and she entered the vehicle. (31 RT 14838, 14840, 14843-45, 14851-52.)[4/]

Zaccardi was very angry at Linda about the theft, but more from a sense of betrayal rather than loss. (31 RT 14852-53.) In her anger, Zaccardi grabbed the door to the vehicle as Linda tried to close it behind her. (31 RT 14838-39.)

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4. Zaccardi remembered the vehicle as being a station wagon. (31 RT 14840-41.) One vehicle in appellant's possession had been a van with a black-over-cream exterior. (31 RT 14904-05.)

Despite her anger, Zaccardi was disquieted by the driver's silence and complete lack of reaction to her own conduct. (31 RT 14840, 14843-44, 14854.) This disquiet caused Zaccardi to "back off" and let go of the vehicle, and the vehicle departed. (31 RT 14839-40, 14843-44.) Zaccardi never saw Linda again. (31 RT 14842.)

(ii) Sheila J.

Sheila J. disappeared next, within a few days prior to the March 20, 1986 birthday (29 RT 14173) of her grandmother Rosie Missouri.

Sheila's age was 16 or 17 years (29 RT 14172, 14326), and she had an infant daughter (29 RT 14180). Sheila lived with her grandmother, who had raised Sheila as her adoptive daughter. (29 RT 14170-71, 14173.) Sheila weighed about 130 pounds, and her height was about 5 feet, 4 inches. (29 RT 14183.) Sheila dated 18-year-old Patrick Ware (who was also seeing Linda's older sister Ann from time to time). (29 RT 14322, 14326.)

On the evening in question, Sheila and Patrick went bicycling for several hours, and then Patrick dropped off Sheila at her (and her grandmother's) home at about 7:00 p.m. (29 RT 14327.) Patrick then departed, going to his grandmother's home to retrieve money which he used to purchase baby supplies (milk and diapering) for Sheila's daughter. (29 RT 14330-31.) Patrick thereafter stopped to play basketball at a park, and eventually he returned to Sheila's home with the baby supplies at about 9:30 p.m. on that same night. (29 RT 14331.)

Sheila was no longer at home. (29 RT 14332.) Sheila's grandmother thought Sheila had left with Patrick to get the baby supplies. (29 RT 14176, 14179-80, 14332.) However, when Sheila departed from home that night, it was not to accompany Patrick. (29 RT 14348.) Sheila was a narcotics user who engaged in prostitution for her income. (29 RT 14182, 14326, 14335.) Sheila also knew appellant, having been introduced to him previously when she

and Patrick picked up Patrick's aunt La-Chelle "Snoopy" Whitfield at appellant's Broadway residence. (25 RT 12861-62, 12864, 12866, 12953-54; 27 RT 13583-84[5].) Broadway, near appellant's residence, was a place where Sheila attempted to get professional "dates." (31 RT 14663-64.)

After Sheila left her home in March 1986, she never returned home, and Patrick never saw her again. (29 RT 14189, 14334.)

b. Recovery Of The Bodies At Appellant's Former Residence

Appellant began living in the residence at 4327 Broadway in November 1985, with the consent of nonresident owner Charles Lueras. Lueras ultimately evicted appellant via a judicial order issued on June 18, 1986. (29 RT 14142, 14145, 14150; 30 ACT 8991, 8898; 31 ACT 9005.)[6] Linda's body was recovered from a shallow grave in the back yard of the residence, near the cement edge of the back porch. (29 RT 14194; 31 RT 14896-97 [depth of soil covering body varied from 9.5 to 15 inches].) Sheila's body was recovered from another shallow grave near the porch, but to the east of Linda's grave. (29 RT 14193; 31 RT 14896 [depth of soil covering body varied from 14 to 15 inches].)

A co-worker had observed evidence of recent digging near the back porch while appellant resided there. (29 RT 14274.) A neighbor had also seen appellant digging in the back yard. (30 RT 14376.) Appellant's explanation at

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5. Witness LaChelle Whitfield once may have given a different location as to where this introduction took place between appellant and Sheila. (27 RT 13582.)

6. From November 1985 until February 1986, appellant had been part of a construction crew rehabilitating the previously-burned residence to the point of habitability. (29 RT 14143-47, 14254-55, 14248, 14263.) In a post-arrest interview, appellant later said he lived at the Broadway residence only until May 1986. (30 ACT 8991; 31 ACT 9005.)

the time was that he was pursuing agriculture. (29 RT 14274-75; 30 RT 14377.) However, in a post-arrest statement, appellant stated the only time he dug in the back yard was when he was replacing posts; he specifically was not engaging in agricultural pursuits. (31 ACT 9042, 9045, 9047, 9050.)[7] Appellant's neighbor recalled that there was, contemporaneous to appellant's residency there, "a smell that . . . one might characterize as a smell of something dead[.]" (30 RT 14404.)[8]

c. Examination Of The Bodies

(i) Linda V.

When disinterred, Linda V.'s body was clothed, and wrapped in a wire-bound blanket. With multiple knots, the electrical-type wire bound the blanket around the shoulder and neck, and also at the ankles. (29 RT 14195; 30 RT 14586, 14589-90, 14615-16.) The April 25, 1987 autopsy of Linda's body permitted conclusions that Linda had died approximately one year earlier. A time since death less than 6 months was unlikely, as was a time since death greater than 18 months. (31 RT 14798-14802; see also 30 RT 14604-05.) The results of the autopsy did not affirmatively indicate either disease or mechanical trauma as a cause of death, and a few such causes were excluded. (30 RT 14599-14601, 14605-07.)

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7. To prevent confusion, it is noted that the transcript of this April 22, 1987 interview includes a duplicative span of pages. (See 31 ACT 9107-35; 34 RT 15772.)

8. During an investigation of another murder, and prior to the discovery of the bodies at the Broadway residence, appellant would attempt to conceal this address from police by giving his mother's address instead as a place for him to be reached. (19 RT 11213-14.)

(ii) Sheila J.

Sheila J.'s body had been wrapped in white bedding which was secured by duct tape. (29 RT 14194-95; 2 Exh.-ACT 469-70 [Peo.'s Exh. 163-A].) Inside the bedding, Sheila's body was nude, in a fetal position. (30 RT 14554, 14556.) Next to Sheila's body was a sweatshirt with a boat design on the back, which garment Sheila had been wearing the day she disappeared. (29 RT 14177-79, 14288; 30 RT 14559, 14565; 3 Exh.-ACT 601-02 [Peo.'s Exh. 227] & 605-06 [Peo.'s Exh. 227].)

Duct tape bound the nude body, covering the mouth to the back of the neck. (30 RT 14558; 34 RT 15574.) This tape held in place, in Sheila's mouth, a balled-up sock. (32 RT 15093-94; 34 RT 15574.) Additional duct tape bound Sheila's trunk, legs, and thighs, and additionally bound her ankles. (30 RT 14558.)

At the time of the April 24, 1987 autopsy (30 RT 14553) of Sheila J.'s body, a time since death of approximately one-year was likely, with variance of more than six months in either direction being unlikely. (31 RT 14798-14801.)[9] The results of the autopsy did not affirmatively indicate either disease or mechanical trauma as a cause of death, and a few such causes were excluded. (30 RT 14581-84.)

2. Forcible Sexual Assaults On Melissa H. (Counts III, IV, V, VI)

Melissa H. survived and was able to testify.

Melissa and her boyfriend Howard Allen were heavy users of heroin,

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9. The decomposition of Sheila's body was more advanced than that of Linda's body. An increased level of decomposition could be expected because of the increased moisture in Sheila's grave and because Sheila's body was clothed underneath the bedding while Linda's body was nude underneath the bedding. (30 RT 14557, 14591-93.)

and by 1986 they were each consuming about 1.5 grams of the narcotic daily. (33 RT 15266, 15278.) Melissa, at least, was addicted to heroin. (33 RT 15280-81; see 26 RT 13265.) Melissa would occasionally use cocaine as well. (33 RT 15279-80.)

Melissa engaged in prostitution to supply the income for her and Allen's narcotics consumption. (33 RT 15267-68.) However, Melissa did not professionally "date" Black men, and she told this to appellant the first time he sought such a "date." (33 RT 15276-77.) Appellant expressed upset on this occasion, and he and Melissa exchanged verbal insults. (33 RT 15277.) This was not the last occasion on which appellant was rebuffed in an attempt to "date" Melissa. (33 RT 15276.)

Melissa despised appellant. (26 RT 13326.) However, at the invitation of another prostitute named Laurie, Melissa joined her and appellant to smoke rock cocaine in appellant's car. (33 RT 15281-83.) Appellant parked the car outside the long-vacant residence at 3200 Sacramento Boulevard. (33 RT 15284.)

The last time Melissa encountered appellant was the night appellant sexually assaulted her. (33 RT 15288.) This night was approximately five weeks after Melissa joined Laurie and appellant to smoke cocaine. (33 RT 15313.) It was also a "couple" of weeks before Yolanda J.'s body would be discovered. (33 RT 15309.)

At the time, Melissa was residing in a vacant apartment where she would also engage in professional "dates." (33 RT 15287-89, 15297.) Normally, Howard Allen did not stay with her at night. (34 RT 15643.) Howard Allen dropped off Melissa at the apartment at some time between 11:30 p.m. and 1:00 or 2:00 a.m. (33 RT 15289-90; 34 RT 15644.) Allen had the proceeds of Melissa's recent "dates" and he was supposed to return with heroin. (33 RT 15289-90.)

Melissa found that she could not enter through the front door with the key. (33 RT 15290-91.) Melissa ultimately went to the back door, which she found ajar. (33 RT 15290, 15292.) Melissa entered the apartment partially, reaching in to turn on the kitchen light. When that failed, Melissa began to step back out of the apartment. (33 RT 15292-93.) However, appellant was waiting inside; laughing, he grabbed Melissa and pulled her back inside the apartment. (33 RT 15293-94, 15296.)

Appellant carried a knife with a curved, abnormal blade, and he placed the blade to Melissa's neck. (33 RT 15294-95.) Forcing Melissa into an interior room, appellant made her remove her clothing and get onto her bed. (33 RT 15295-97.) Punching Melissa, appellant got on top of her and forced her to orally copulate his penis. (33 RT 15297-99.) Melissa began to vomit. (33 RT 15299.)

Next, appellant forced Melissa to turn over on the bed. (33 RT 15299-15300.) Appellant bound Melissa's hands behind her with a piece of leather. (33 RT 15300.) Appellant then sodomized Melissa. (33 RT 15300-01.) Melissa cried and screamed. (33 RT 15301.) Appellant responded by stuffing Melissa's sock into her mouth, striking Melissa repeatedly, and telling Melissa to shut up. (33 RT 15301.) Melissa continued to cry. (33 RT 15301.)

Appellant next turned Melissa back over onto her back. (33 RT 15301-02.) Appellant removed the sock from Melissa's mouth and replaced it with his penis, forcing Melissa to orally copulate him for some minutes. (33 RT 15301-02.) Then, appellant removed his penis from Melissa's mouth and he placed it inside her vagina, raping her for additional minutes. (33 RT 15302.)

Finally, appellant rose and went into the bathroom. (33 RT 15302.) When appellant returned, Melissa had begun to sit up. (33 RT 15302-03.) Appellant then removed the electrical cord from a lamp and bound Melissa's

feet. (33 RT 15303.) Appellant looped another cord around Melissa's neck in a manner so that it would tighten if she moved her neck, and appellant connected the cords. (33 RT 15303-04.) Melissa had no memory of what happened next. (33 RT 15304.)

Hours passed, and the next thing Melissa remembered was hearing Howard Allen knocking at the front door and yelling for her to open the front door. (33 RT 15304-06.) It was about 7:30 a.m., and appellant was still present; however, he now fled through the back door. (33 RT 15305; 34 RT 15627-28, 15645.) Ultimately, Allen went around the apartment and entered through the back door. (33 RT 15306; 34 RT 15628-29.)

Melissa had been completely immobilized. (33 RT 15305.) Her body was atop the bed, bundled in a quilt. (34 RT 15629.) Inside the quilt, her body was bound. (34 RT 15629.) Melissa's feet were tied to the bottom of the bed and her hands were tied to the head of the bed. (34 RT 15630.) A large sock or other cloth item was stuffed into Melissa's mouth and held in place with additional binding. (34 RT 15629-30.) Melissa's body was bloodied at her nose, mouth, and vagina. (34 RT 15631.) The blood on Melissa's face was somewhat dried and no longer flowing, but blood still dripped from between her legs. (34 RT 15631.) Allen untied Melissa. (33 RT 15315.)

3. First Degree Murder Of Yolanda J. (Count VII)

a. Disappearance Of Yolanda J.

Yolanda J. disappeared a few days before June 18, 1986.

Yolanda's age was 22 years, her height was 5 feet or 5 feet 1 inch, and she weighed about 105 pounds. (19 RT 11064.) Yolanda had become a mother when she was in the 9th grade. (21 RT 11685.) Yolanda resided with her mother Alice McJamerson. (19 RT 11064.)

After spending the night at the home of Johnnie May Johnson, Yolanda departed on the morning of June 15, 1986 and was later seen at noon or in the afternoon within about one block of the PJ&W liquor store. (19 RT 11090.) Johnnie May never saw Yolanda alive again. (19 RT 11094.)

b. Public Discovery Of Yolanda's Body At Appellant's Worksite

On the morning of June 18, 1986, the police became aware that Yolanda's dead body was in a closet of a house at 3445 4th Avenue in Oak Park. (19 RT 11016-17, 11041, 11180.)

Contemporaneous external examination revealed that very distinctive ligature marks were present on Yolanda's neck and wrists. (19 RT 11043, 11053; see 19 RT 11170, 11172.) Yolanda's body was face up, but her left arm was under the body and close to the right arm in a manner suggesting the wrists had been bound together behind her, and the binding removed at a time when the arms were dead weight. (See 1 Exh.-ACT 119-20 [Peo.'s Exh. 19]; 19 RT 11041, 11043, 11168, 11217.) Similarly, her legs were open but her feet were together (See 1 Exh.-ACT 123-24 [Peo.'s Exh. 21]; 19 RT 11168.)

Yolanda's body was nude below the waist. (19 RT 11174.) Semen stained Yolanda's inner thighs, but these stains had not traveled from her vagina. (19 RT 11192; 22 RT 11948-49, 12057-58.)

There was considerable decomposition of the corpse, including blistering of the skin. There was larval maggot infestation, and the distinct smell of decomposition was prevalent. (19 RT 11041-42, 11169-70, 11206.)

c. Medical Examination Of Yolanda's Body

Yolanda's body was autopsied at about 3:00 p.m. on June 18, 1986. (20 RT 11560-61.) From the level of decomposition and the maggot infestation, the time since Yolanda's death was not less than one day and

possibly as much as four days. (20 RT 11561, 11565, 11576-77.) Manual or ligature strangulation resulting in asphyxiation, and death by cocaine overdose, were among numerous possible causes of death not excludible medically. (20 RT 11581-83, 11613-26, 11638-40, 11651.) Excludible causes included trauma such as gunshot wounds, stabbing, or blunt trauma, as well as fire or certain diseases. (20 RT 11615-16.)[10/]

Blood typing could not exclude appellant as a source of the semen stains on Yolanda's body (22 RT 12067-68, 12093),[11/] but it did exclude appellant's former housemate Ronnell Birdon as a possible donor (22 RT 12056).

d. Appellant's History With Yolanda

Appellant had some history with Yolanda, and a history of some antagonism toward her.

Yolanda was a prostitute and a user of narcotics. (20 RT 11471; 21 RT 11675.) Appellant enjoyed the company of prostitutes generally, both socially (31 ACT 9025) and sexually (30 ACT 8955). Appellant at times enjoyed the company of Yolanda specifically, both socially (see 22 RT 12099; 31 RT 14736; see also 21 RT 11735-37; 30 ACT 8953) and sexually (19 RT 11214-15; see 30 ACT 8959). Yolanda ultimately found she was able to engage in her prostitution activity at 3445 4th Avenue, rather than renting space for the activity. (21 RT 11841.)

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10. Yolanda had yellow jaundice a month prior to her death. (21 RT 11841.) Her eyes retained some yellowing from hepatitis in the days prior to June 18, 1986. (19 RT 11103, 11122.)

11. Along with Yolanda's body, items recovered from the closet included a purse, a tampon, and panties. (19 RT 11188-89.) Blood typing excluded appellant as a possible source of blood and semen found on the tampon. (22 RT 12064, 12066, 12093.)

However, appellant believed Yolanda had stolen from him more than once. According to appellant, Yolanda stole $20 from him in January 1986. (30 ACT 8830.) Appellant also attributed to Yolanda the loss of a ring valued at $450. (31 ACT 9006.) In addition, in the latter half of March 1986, appellant remarked to Vernell Dodson that he was "going to kill that bitch" – referring to Yolanda as she passed – because appellant believed Yolanda had been instrumental in a prior theft of his stereo equipment. (20 RT 11341, 11345-47, 11352-53, 11372, 11376-78.)

In fact, one night shortly before June 18, 1986, appellant was looking for Yolanda. Appellant was angry and he stated his intention to work physical violence on Yolanda if he found her. (20 RT 11498-99, 11506-07, 11520; 22 RT 12144.)[12/]

e. Appellant's Exclusive Access To The 4th Avenue Structure

For the span of days during which Yolanda was deceased and her body was undiscovered (June 15 or 16 through June 18, 1986), as well as during the prior few weeks, appellant had exclusive access to the location where Yolanda's body would ultimately be found.

The 4th Avenue structure had three levels, including a bottom level resting below the street (the basement), a main level resting above street level (the house), and an upper attic level atop the house (the apartment). (19 RT 11138-39, 11318-19; see 1 Exh.-ACT 83-84 [Peo.'s Exh. 1], 89-90 [Peo.'s Exh. 4], 93-94 [Peo.'s Exh. 6].) There was no ingress possible from the interior of one level to the interior of another level; rather, it was necessary to exit and use one of the external stairways. (19 RT 11146; see

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12. Witness Pam Suggs mistakenly once stated this was the night before Yolanda's body was found, but Suggs clarified at trial that she could not state that as the date. (20 RT 11499-11500, 11502.)

1 Exh.-ACT 85-86 [Peo.'s Exh. 2], 91-92 [Peo.'s Exh. 5], 93-94 [Peo.'s Exh. 6].)[13/]

The owner of the 4th Avenue structure was Charles Sinkey, who had purchased the structure to rehabilitate it for profit. (19 RT 11136.)[14/] Appellant had worked for Sinkey on prior projects, and for this project Sinkey hired appellant to perform "end work" or "clean up work" on the 4th Avenue structure. (19 RT 11137-38, 11143, 11153.) Appellant's tasks were to include some carpentry and sheetrock work. (19 RT 11138, 11143-45; see 19 RT 11333.) Appellant's tasks did not include carpet installation; rather, one month earlier, another worker had completed all the carpet installation which Sinkey intended to do, with the exception of one or two unfinished closets. (19 RT 11155-56, 11221-22; see 19 RT 11148.) Most of the required repairs were complete by April 1986. (19 RT 11325.)

Approximately one month before June 18, 1986, Sinkey went to Anderson, California to pursue another venture. (19 RT 11142-43.) At this time, appellant had completed certain parts of his task, and he had begun the installation of air conditioning. (19 RT 11143-45.) In fact, appellant was then the only worker remaining on the project. (19 RT 11152.) Appellant had the keys to the locks, and a June 18, 1986 inspection revealed an absence of lock

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13. The basement was not legally habitable, and the living units had been removed from that level. (19 RT 11139, 11319.) However, transients had accessed, and continued to access, the basement without permission. Some of these transients were also attracted to the PJ&W liquor store which was "just right next to" the property, with an alley between the rear of the structure and the store. (19 RT 11139-40; 20 RT 11448, 11451; 21 RT 11710.) There were no such problems with the house level or the apartment level. (21 RT 11757.)

14. Harry Montfort was one of the investors in this venture, as in other ventures by Sinkey. (19 RT 11136-37.)

malfunction or forced entry. (19 RT 11159, 11177; 21 RT 11764-65, 11780.)[15/]

f. Abrupt End To Appellant's Exclusive Access

Appellant had notice only for a very short time that his access to the residence would not be exclusive as of June 18, 1986.

Although Sinkey had driven by the 4th Avenue property once a week or so while pursuing his Anderson venture (19 RT 11147, 11156), the assigned building inspector had observed that work had stopped and the basement level was not being kept secure (19 RT 11320-23, 11329, 11335-37). To spur some action, the inspector had on June 9, 1986, sent Sinkey a notice threatening the permit for the property would be canceled in 10 days. (19 RT 11335.)

As a result, on June 16 or 17, Sinkey came back into town and he went to look at the 4th Avenue property. (19 RT 11141, 11142-43, 11146, 11158-60.) Because Sinkey had given his keys to appellant, Sinkey could not enter the house level or apartment level. (19 RT 11146, 11159-60, 11163.) On June 17, 1986 (19 RT 11162), Sinkey went to appellant's home and they arranged to meet at the 4th Avenue property on June 18, 1986, to assess the state of repairs and determine what else needed to be done. (19 RT 11140, 11156, 11159-60.) Instead, on the following morning appellant arrived early and entered the 4th Avenue residence, exited minutes later, and loudly drew attention to his claimed discovery of the female corpse inside the house. (21 RT 11716-17.)

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15. Worker Harold Lusk once had keys to the locks, but Lusk's last day on the premises was April at the latest. (20 RT 11445, 11450, 11453-55, 11460-61, 11486.) Further, he returned the keys to appellant. (See 20 RT 11456-58.)

g. Appellant's Factual Recitations

On the scene, appellant began lying, and he would continue to lie, about matters including his name, the discovery of Yolanda's body, his recognition of Yolanda, and his activity at the residence.

First, appellant lied about his name, telling police officers and a television reporter on the scene that he was Carl Patilla or Ernest Carl Patilla. (18 RT 11017-18; 19 RT 11288-89; 21 RT 11751.) Appellant did not correct the lie until the police demonstrated their ability to locate him at his Broadway residence later that afternoon (19 RT 11182-85, 11200-01) – despite the fact appellant had also lied about his address by giving his mother's address instead (19 RT 11213-14; 21 RT 11752).

Another lie concerned the discovery. Rosie Moore, who was on the corner of 4th Avenue and 35th Street that morning, saw appellant enter the house. She observed him use a set of keys to unlock both the deadbolt and doorknob lock on the front door before entering. (21 RT 11715-16.) In later police interviews, appellant would also acknowledge using a key to unlock both locks, in order to enter. (30 ACT 8824, 8984.) However, in a conversation with a television reporter that morning, appellant specifically indicated he had not needed to use his key to enter. (19 RT 11296.)

Also on the scene, during conversation with the reporter, appellant demonstrated his recognition of the corpse, in that he was adamant that the deceased was not a prostitute. (19 RT 11295, 11311.) However, consistently from that morning appellant told police he had not recognized the corpse in light of the circumstances. (19 RT 11200, 11201-02; 21 RT 11755; see 30 ACT 8960.)

During an early police interview, to explain his entry into the residence on June 18, 1986, appellant stated that on that morning he entered the front door and exited the back door – of the house level – to retrieve, from outside,

some mildewed carpet to install on the apartment level. (See 30 ACT 8823; see 31 ACT 9062-64.) During the same interview, appellant acknowledged he did not install any of the carpet in the house level. (30 ACT 8843.) However, in a later interview, appellant claimed he installed all the carpet in the house, personally. (30 ACT 8951-52.) Appellant later again recited to police that he did not install any carpet at the house. (30 ACT 9065-66.)

The subject of time at the residence prompted lying. On the morning of June 18, 1986, in the recorded television interview, appellant told the reporter that his last time at the residence was eight days before (June 10, 1986). (See Peo.'s Exh. 363 [videocassette identified and admitted at 19 RT 11290-92].) However, appellant later told an officer that the last time he had been at the residence was "two days ago" (June 16, 1986). (21 RT 11753.) Appellant elaborated that when he had entered the house two days before, he had worked there for six hours and his inspection at that time revealed no corpse was in the closet. (21 RT 11175-56.) Five hours later on June 18, 1996, appellant told police he had been mistaken, and that the last time he had been at the residence was nine days prior to June 18, 1996 (June 9, 1986). (21 RT 11760-63.)

All three stories were false – appellant had been at the residence just the day before with Cathy Guess and another worker, having hired the two of them to install sheetrock in the apartment level. (20 RT 11410-12, 11414.) At the time, there was an odor which Cathy Guess associated with the odor common in an old house, like a smell of dead rodents. (20 RT 11422, 11433-34.)[16/]

Finally, appellant recited to Edys Whiteside a detailed account that Yolanda had robbed a prostitution customer of a lot of money, that she then purchased a lot of rock cocaine at a residence on Fourth Avenue, that she

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16. Appellant was supposed to pick up both workers at 9:00 a.m. on June 18, 1986 to finish this work, but appellant did not show up. (20 RT 11420.)

smoked a lot of the rock cocaine, that she "passed out" and could not be revived, that undisclosed persons transported Yolanda to 3445 4th Avenue, and they placed an item around her neck so it would appear she was murdered. (25 RT 13013-17, 13021.) Appellant told this to Edys Whiteside as a rumor that he heard from "somebody." (25 RT 13013.) Later, appellant told police that this rumor had been passed on to him by his housemates; however, the content of the rumor had changed such that in this version the transporters first killed Yolanda at a specific location. (30 ACT 8967-68.)

4. Murder Of Angela P. (Count VIII)

Like Yolanda about one month before, Angela P. was to be discovered dead in an uninhabited residence just a few days after last being seen alive.

a. Disappearance Of Angela P.

Angela P.'s age was 24 years, her height was about 5 feet, 10 inches, and her weight was about 120 pounds. (23 RT 12384; see 23 RT 12418.) In her life, Angela was severely addicted to rock cocaine (20 RT 11480; 23 RT 12272.) To supply her addiction, Angela prostituted her body, and her services included any sexual act. (20 RT 11480; 23 RT 12272.) Angela's nickname was "Lisa Lips." (20 RT 11480; 23 RT 12271-72.)

Angela was last seen shortly after 3:00 a.m. on July 16, 1986. It was at this time that Angela departed from the home of Janice Scott in the company of a man. Appellant resembles that man. (24 RT 12612, 12616, 12618, 12621-22, 12624-25, 12637.) Angela had come to the residence with the man for the purpose of engaging in a 10-minute act of prostitution in Janice Scott's bathroom, but this accommodation was refused. (24 RT 12613, 12615.)[17/] Angela consumed some cocaine before departing. (24 RT 12615-16.)

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17. It was not uncommon for Angela to use Janice Scott's residence for such purposes, upon payment of $5 per use. (24 RT 12607-08.)

b. Discovery Of Angela P.'s Body At 3200 Sacramento Boulevard

Angela's dead body was discovered on the evening of July 20, 1986, in the basement of the abandoned residence at 3200 Sacramento Boulevard[18] in Oak Park. (23 RT 12307, 12309, 12314; see 22 RT 12187, 12195; 1 Exh.-ACT 147-48 [Peo.'s Exh. 32].)

Angela's body was concealed under several vent filters near a water heater. (23 RT 12317; 1 Exh.-ACT 173-74 [Peo.'s Exh. 45], 175-76 [Peo.'s Exh. 46], 185-86 [Peo.'s Exh. 51].) Underneath, the body was supine, with the upper part clothed in a tan jacket and a striped top. (23 RT 12318, 12319, 12366; 1 Exh.-ACT 191-92 [Peo.'s Exh. 54], 195-96 [Peo.'s Exh. 56], 201-02 [Peo.'s Exh. 58].) The body was unclothed below the waist (1 Exh.-ACT 195-96 [Peo.'s Exh. 56]), with the exception that shoes, with still-fastened straps, were on the feet (1 Exh.-ACT 195-96 [Peo.'s Exh. 56], 197-98 [Peo.'s Exh. 57]; 23 RT 12366). A pair of short pants, white in color, rested atop the body, covering the body from the torso to just above the vagina. (1 Exh.-ACT 191-92 [Peo.'s Exh. 54], 195-96 [Peo.'s Exh. 56]; see 23 RT 12366.) Angela had been wearing these garments when last seen. (24 RT 12614, 12617-18.)

There were restraints. Angela's wrists were underneath her back, bound together with insulated, electrical-type wire. (23 RT 12367-68, 12371; 1 Exh.-ACT 191-92 [Peo.'s Exh. 54], 205-06 [Peo.'s Exh. 60], 231-32 [Peo.'s Exh. 71].)[19] Angela's mouth was gagged, with two athletic socks having been

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18. Now Martin Luther King Boulevard.

19. Additional wire was on the floor nearby, as well as around the ankle and left thigh area of Angela's body. (1 Exh.-ACT 197-98 [Peo.'s Exh. 57].) As well, on the floor and atop the water heater were two lengths of the wire, each attached to separate pieces of wood. If the wires were previously joined, the resulting construct would have been a makeshift garotte. (1 Exh.-ACT 209-10 [Peo.'s Exh. 62], 211-12 [Peo.'s Exh. 63]; see 23 RT 12336-38.)

pushed into her mouth and then tied in place with fabric binding which circled her head. (23 RT 12367, 12410-11; 1 Exh.-ACT 201-02 [Peo.'s Exh. 58].)

c. Time And Cause Of Death

The time of Angela's death was at least 24 hours before the discovery of the body on July 20, 1986. (20 RT 11565; 23 RT 12367.)[20/] Based on an autopsy commencing at 2:00 p.m. on July 21, 1986, Angela's time of death was not later than the afternoon of July 19, 1986. (23 RT 12365-66, 12372.)

Purely from the perspective of medical evidence, major forcible trauma to the body could be excluded as a possible cause of death. (23 RT 12401.) Certain natural causes, as well as asphyxia or cocaine poisoning, could not be excluded as possible causes of death. (23 RT 12401-05, 12408; see 23 RT 12424.)[21/]

d. Appellant, Angela, And 3200 Sacramento Boulevard

Appellant made numerous assertions about his connection to Angela and the property where her body was found. When the subject of the 3200 Sacramento Boulevard residence was mentioned in an April 20, 1987 interview (30 ACT 8936), appellant quickly volunteered that he and Charles Lueras "were trying to buy" the residence "a long time ago." (30 ACT 8937.) However, appellant insisted at first that he had never been inside the residence. (30 ACT 8937:10-14.) Within moments, appellant reversed, stating that in fact he and Lueras physically "checked that house" in its entirety – "[e]verything in that

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20. When discovered, Angela's body was infested with maggots. (See 1 Exh.-ACT 223-24 [Peo.'s Exh. 69]; 23 RT 12367.) Other medical testimony established that larval infestation of a corpse implies a time since death of at least 24 hours. (20 RT 11565.)

21. Cocaine was present in Angela's liver in an unknown amount. (23 RT 12400, 12474.)

place" – poking and pulling at the physical structure pre-purchase for the purpose of planning property repairs. (30 ACT 8937-39.)[22/] Appellant specifically volunteered there were filters or panels there, and he allowed for the possibility he might have touched them. (30 ACT 8940.)

During this interview, appellant denied ever being one of Angela's professional customers. (30 ACT 8940.1.)

In a post-arrest interview on the night of April 22, 1987, appellant reiterated that his visit to 3200 Sacramento Boulevard was with Lueras. (31 ACT 9073.) Per appellant, this visit was in March 1986. (31 ACT 9078.) Appellant specifically stated that on this date the filters were stacked on the floor, in the part of the basement near the water heater. (31 ACT 9074.)

During this interview, appellant stated he never did "take nobody in front of 3200 Sacramento Boulevard." (31 ACT 9073.) Appellant stated he never smoked rock cocaine on Sacramento Boulevard. (31 ACT 9094.)

In fact, appellant did not go to 3200 Sacramento Boulevard with Lueras. Lueras never went to look at this residence, for any reason. (20 RT 14154.) While Lueras was a real estate investor, he never spoke to appellant about any potential properties if he was considering them for investment. (20 RT 14154, 14165; see also 20 RT 14168.)

In fact, the filters could only have been stacked by the water heater in July 1986, during a short window of time. The basement was not cleaned up until about two weeks prior to July 20, 1986, and on that date the filters were stacked in the opposite corner of the basement. Further, prior to this clean up, the filters had not been stacked at all, but instead they had been strewn about the basement. (22 RT 12214, 12221-25; see also 1 Exh.-ACT 175-76 [Peo.'s Exh.

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22. In appellant's version, he engaged in this physical destruction even though this was the private property of another person and that – per a later clarification by appellant – appellant and Lueras did not even know whether the property was for sale. (See 31 ACT 9091.)

46].)

In fact, appellant had been one of Angela's clients (22 RT 12099-12100; 25 RT 12919; 27 RT 13582, 13586-87; see also 24 RT 12825.) Angela had frequented the basement of 3200 Sacramento Boulevard when rendering services during professional dates. (22 RT 12100-01; 24 RT 12611, 12640-41.)

In fact, outside this residence was where (on a date prior to his sexual assaults on Melissa) appellant had parked when he drove Melissa and Laurie to smoke rock cocaine. (33 RT 15281-84.)

e. Two Unspecified Persons And 3200 Sacramento Boulevard

Charles Henry lived next door to 3200 Sacramento Boulevard. One night, very late in the evening or possibly after midnight, Henry saw two men sitting on steps near the entrance to the basement. (22 RT 12238-40; 1 Exh.-ACT 165-66 [Peo.'s Exh. 41].) At the time, Henry was parking his car for the evening. (22 RT 12240 - 23 RT 12241.) The two men turned their heads away from Henry as he parked. (23 RT 12241.) Henry parked and entered his home, and when he checked about five minutes later the men had departed. (23 RT 12242.) This evening could have been on the 17th, and it could have been on the 19th, of July 1986. (23 RT 12238, 12256-57.)

5. First Degree Murder Of Maria A. (Count IX) And First Degree Murder Of Sharon M. (Count X)

By August 1986, appellant was a tenant at 2523 19th Avenue. The bodies of Maria A. and Sharon M. would be recovered from the back yard of the residence.

a. The Tenancy At 2523 19th Avenue

After his eviction from the Broadway residence on June 18, 1986 (30 ACT 8898), appellant met Celestine Stevens, who in July or August 1986

sublet to appellant the master bedroom in the rear of the 19th Avenue residence. (26 RT 13194-95, 13199, 13201-02, 13239, 13319; see 31 ACT 9008-09.) At the time appellant moved in, the other inhabitants at the 19th Avenue residence were Celestine, Ronnell Birdon, two of Celestine's children from a prior marriage, and a third infant who was the product of Celestine's involvement with Ronnell. (26 RT 13197, 13199-13200.) On September 10, 1986, Celestine's friend Cedric McGowan also moved into the residence. (25 RT 13104-05, 13107; 26 RT 13228-29.)

Celestine and Ronnell had used rock cocaine to some degree before appellant moved in. (26 RT 13221-22.) However, there was an extreme increase in household rock cocaine usage once users appellant and Cedric joined the collective. (26 RT 13326, 13329; see 25 RT 13118-19.) The payment of rent had already been erratic, and this increased level of consumption lessened the amount of money available for non-rock cocaine expenditures. (24 RT 12745; 26 RT 13222, 13226.) In late October 1986, despite a court battle, the entire household was evicted. (26 RT 13242, 13244, 13247.)[23] From that date, and through and past the time of discovery of corpses in the back yard, the residence remained vacant. (24 RT 12749-50.)

b. Death Of Maria A.

In August 1986, Maria A.'s age was 18 years, her height was a few inches over 5 feet, and her weight was about 120 to 130 pounds. (24 RT 12767, 12734.) She had a longstanding addiction to heroin. (24 RT 12768-69.) On September 8, 1986, while appellant was part of the last tenancy at the 19th Avenue residence, Maria was alive. She had been released after several days custody following an arrest for prostitution.

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23. After the eviction, Ronnell Birdon and Celestine Stevens parted ways, and Ronnell would eventually end up as appellant's roommate at a 44th Street residence. (30 ACT 8879.)

(27 RT 13691-92.)

Maria's body was unearthed from the back yard of the residence at 2523 19th Avenue on March 19, 1987. (24 RT 12728-29; 25 RT 13069.) The grave was near the master bedroom. (24 RT 12713, 12721-22; 26 RT 14948.) The corpse was in a bundle wrapped in black plastic sheeting, with the body buried primarily at a depth of about three feet. (24 RT 12713, 12716; 25 RT 13069.) However, the feet of the corpse were not fitted into the main burial chamber, but stuck up such that they were at a depth of only about six inches. (25 RT 13069.) Just two or three inches below the surface, a piece of plywood was sunken above the grave. (25 RT 12965; see 24 RT 12713, 12718.)[24/]

Inside the black plastic sheeting, an inner bundle was comprised of the body wrapped in a green-and-blue bed sheet, which had been gathered and tied into two knots, one at each end. (24 RT 12732-33; 25 RT 13084; 26 RT 13337-38.) This sheet had belonged to Celestine, and had been in the closet in appellant's bedroom. (32 RT 14986-87; see 26 RT 13144, 13148, 13174-76, 13282.)

Inside the sheet was the clothed body of Maria A. A rope-like material made of cloth held the clothed body in a fetal position (24 RT 12732; 26 RT 13339-40, 13343), but with the wrists bound together behind the knees (26 RT 13340, 13342; see 24 RT 12732.)

Medical examination revealed Maria had died a short time after her September 8, 1986 release from custody. From the advanced decomposition (contributed to by the moist soil of the grave) the time since Maria's death was likely three to six months. (26 RT 13344-51.)[25/] Medically, causes of death

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24. There was a large dog in the back yard during the tenancy. (26 RT 13211, 132115.)

25. Medical examination could not itself exclude a likely time since death of eight months. (See 26 RT 13349-50.)

excluded certain types of asphyxia and major bodily trauma. (See 26 RT 13368-69.) Among possible causes not excluded was asphyxia resulting from either suffocation or wide-ligature strangulation. (26 RT 13367-68, 13388.)

c. Death Of Sharon M.

Sharon M. was aged 29 years, her height was about 5 feet, 2 inches, and her weight was between 100 and 110 pounds. (34 RT 15565; see 33 RT 15517; see 4 Exh.-ACT 944-45 [Peo.'s Exh. 454], 946-47 [Peo.'s Exh. 455].) In late July or August of 1986, Sharon began employment as a "behavioral coordinator" in the Obesity Treatment Center at Sutter Hospital. (33 RT 15515-16.) However, Sharon also engaged in prostitution. (25 RT 12848-50.)

On or about September 1, 1986, Sharon moved into a new apartment. (33 RT 15520-21.) Sharon called her mother to report her new address and telephone number on the night of September 12, 1986. Sharon's mother never heard from Sharon or saw her again. (34 RT 15588-89.) Sharon's co-workers never heard from her after the weekend of September 13 and 14, 1986 (Sat. (33 RT 15515-16, 15521-22, 15530; 34 RT 15569, 15590-95.)

On April 28, 1987, Sharon's body was discovered buried in a grave in the back yard at 2523 19th Avenue. (33 RT 15462, 15468-69, 15540.) The grave was in a run area which was bounded lengthwise by the left side of the house and a fence, and bounded on the front end by gated fencing. (33 RT 15465, 15468; 3 Exh.-ACT 667-68 [Peo.'s Exh. 256], 679-80 [Peo.'s Exh. 262].) During the tenancy, a dog house for Celestine's large dog had been at the corner of the house where the run area connected to the rest of the back

yard. (26 RT 13210-11; see 3 Exh.-ACT 669-70 [Peo.'s Exh. 257.)[26/]

A nubbed bedspread formed the exterior wrapping of the bundled body. (33 RT 15471, 15540; 34 RT 15678; 3 Exh.-ACT 715-16 [Peo.'s Exh. 279], 717-18 [Peo.'s Exh. 280].) This bedspread belonged to Celestine Stevens and had been inside a closet in the 19th Avenue residence. (33 RT 15028-29; 34 RT 15678-79.)

Inside the bedspread, an interior wrapping of the body was formed by a sheet colored in white, yellow, blue, and green, and bound in a large knot over the left shoulder and chest area. (33 RT 15473; 34 RT 15541-42.)

Inside the sheet, a severed cord bound the thighs, legs, and ankles, holding the body in a fetal position (34 RT 15542, 15545, 15547; 3 Exh.-ACT 753-54 [Peo.'s Exh. 298], 765-66 [Peo.'s Exh. 304]), with a braided fabric strap or belt binding together the wrists behind the back (34 RT 15542, 15545; 3 Exh.-ACT 763-64 [Peo.'s Exh. 303]). When Celestine moved out of the residence, she found she was missing a severed cord which she had used to power the television which she kept in the garage. (34 RT 15689-95.)

A three-foot stereo speaker connector encircled Sharon's neck, resting on her shoulders. (34 RT 15548, 15654; 4 Exh.-ACT 1093-94 [Peo.'s Exh. 534].) This speaker connector was exactly like one which belonged to Celestine Stevens. (34 RT 15654, 15688.) Celestine had noticed her speaker connector missing from the residence in mid-September 1986, at about the time Sharon disappeared. (See 34 RT 15682, 15685.)

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26. It appears Sharon's grave was more shallow than Maria's grave. (See 25 RT 13069 [Maria's grave down to 3.5 ft]; 33 RT 15495-96 [soil covering Sharon's body ranged from about 10 to about 16 inches].) However, Maria's grave was in moist and soft ground (see 24 RT 12709, 12731; 26 RT 14950-51), while Sharon's grave was in dry, hard earth (see 3 Exh.-ACT 717-18 [Peo.'s Exh. 280]). The borrowed shovel which was then available to appellant was a flathead shovel (27 RT 13492-96, 13508) which made for very difficult digging through hard ground (27 RT 13510).

Sharon's upper body was clothed, but her lower body was essentially nude. The only clothing on the lower body were panties and jeans which were on the right leg only, pulled up only partway on the thigh. (34 RT 15543-44, 15546.)[27] A red sock was protruded from Sharon's mouth. (34 RT 15546.) Behind that sock, another red sock was compacted "far back" into Sharon's throat. (34 RT 15560-61.)

Sharon's body was mummified from lack of moisture in the grave, indicating continued lack of moisture in the grave. (34 RT 15550-51.) At the time of the May 1, 1987 autopsy, the time since death was not less than one month, and was likely to be approximately six months. (33 RT 15539-40; 34 RT 15552-54.) Medical examination tended to exclude, inter alia, major trauma to the body as a possible cause of death. (34 RT 15551-52, 15555, 15557-58, 15563.) Asphyxia was among those possible causes of death not excluded. (34 RT 15564-68, 15571-72.)

d. Appellant, The Victims, And 2523 19th Avenue

When asked, twice, during a March 20, 1987 interview to state where he had lived prior to 44th Street, appellant did not answer the question as asked. Instead, appellant reformulated the question as though he had been asked for his prior "permanent" residences. (30 ACT 8870.) Then, appellant listed three locations – including two project sites which were not permanent addresses. Appellant specifically omitted the 19th Avenue residence. (30 ACT 8870-72.) Only after police directly asked appellant about the 19th Avenue residence did he admit having lived there. (30 ACT 8876.)

Further, when asked solely the question of what date he moved into the 19th Avenue residence, appellant stated it was sometime in August, and then without prompting he mentioned he had performed some "shoveling" there.

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27. Sharon wore jeans on weekends. (33 RT 15530, 15533.)

(30 ACT 8877.) Appellant lied about when he moved from the residence, falsely stating he had departed due to an eviction in September 1986. (30 ACT 8876-77.)

In the post-arrest interview on April 22, 1987, appellant stated he had moved into the residence in July 1986, that he was there only in "July and August" and not September, because the household was evicted "[r]ight at September." (31 ACT 9080; see 31 ACT 9012.)

In his March 20, 1987 interview, when shown a picture of Maria, appellant stated he had never seen her before. (30 ACT 8955.) Appellant repeated this denial on April 2, 1987 (27 RT 13602-03.) and during his April 22, 1987 interview (31 ACT 9026). However, Maria had been in appellant's prior Broadway residence several times, and appellant had taken Maria to dinner several times. (22 RT 12103-04, 12143; see also 31 RT 14668-69.) Appellant purportedly was going to take Maria to a bus station so she could attend a drug rehabilitation program in San Jose. (20 RT 11483-84, 11510-11.) Moreover, Maria had been in appellant's company in his bedroom at the 19th Avenue residence. (34 RT 15696-98, 15700, 15706,15717; see 24 RT 12771.)

In early 1986, Sharon had been in appellant's company at an establishment where locals congregated in the parking lot and drank alcoholic beverages. (27 RT 13582, 13588-91.) On or about September 16, 1986, Sharon had smoked rock cocaine at the 19th Avenue residence, together with appellant, Cedric McGowan, Ronnell Birdon, and other women. (25 RT 13132-35.)

6. Forcible Sexual Assault On Sherry H. (Count XI)

While he still had access to the residence at 2523 19th Avenue, appellant encountered, strangled, and raped Sherry H. who lived to testify at trial.

Sherry moved from Fresno to midtown Sacramento in late May or early June of 1986. (32 RT 15203-04; 4 Exh.-ACT 950-51 [Peo.'s Exh. 457].) Sherry moved in with a cousin and she very quickly got a job in fast food. (32 RT 15204-05.) Within about a month after her arrival in Sacramento, Sherry moved into the next door apartment of Steve Becker. (23 RT 15204-05.) Becker was more or less Sherry's boyfriend, and Sherry handled domestic chores at the residence. (32 RT 15205; 33 RT 15255.)

At about the same time, Sherry began using rock cocaine. (32 RT 15206.) Sherry would frequent the Oak Park area two or three times monthly, to "get high." (32 RT 15206-07.)

Money is spent quickly and in considerable amount in such activity. (33 RT 15243-44.) Sherry had some funds of her own from employment, and Becker would give her money from time to time. (32 RT 15207, 15209.) However, to cover the gap in funds as necessary for rock cocaine activity, Sherry would from time to time engage in professional "dates." (32 RT 15207.)

One Friday night in late October 1986, Sherry went out to a house in Oak Park and smoked rock cocaine all night and until morning. (32 RT 15208-11, 15237; 33 RT 15242.) By morning, Sherry had exhausted her funds, but not her appetite for rock cocaine (32 RT 15211.) She wanted to "date" so she could get the funds necessary to obtain more rock cocaine. (32 RT 15211.)

Sherry walked along Broadway looking for a "date," and she managed to catch appellant's attention as he drove by. Appellant circled back and waited for Sherry at a stop sign. (32 RT 15212.) Sherry entered appellant's vehicle, and as he drove she said she wanted to a "date" for money if possible, but that otherwise she would just take a ride out of Oak Park. (32 RT 15213.) Appellant told Sherry he had no money; however, after a short distance appellant said he had $50. (32 RT 15213.) They agreed on a $50 "date."

(32 RT 15214.)

As appellant drove, Sherry asked to stop at a store for beer and cigarettes. Appellant said he had beer at home, and he did not stop. (32 RT 15214.)

Appellant took Sherry to his residence at 2523 19th Avenue[28/] and she followed him inside. (32 RT 15214-16.) By now it was light outside. (32 RT 15217.) At the entrance to appellant's bedroom, Sherry reminded appellant she wanted a beer. (32 RT 15224-25.) Appellant said he would get it and "went back" somewhere. (32 RT 15224-25.)

Just inside the bedroom, Sherry began to remove her sweater. (32 RT 15224, 15225.) Suddenly, appellant was upon her. A round-type shoelace was tightened around Sherry's neck, and appellant began strangling her from behind. (32 RT 15225-26, 15229-31.) Sherry panicked and struggled against appellant, but she could not get her fingers under the ligature. (32 RT 15226.)

Soon, Sherry lost her balance and fell forward to the floor. (32 RT 15226.) As a result of the fall, she was able to get her finger inside the ligature. (32 RT 15227-28.)

Appellant had said nothing during the attack. (32 RT 15228.) On the floor, looking at appellant, Sherry said to him, "Why? I'm a good person," and "I don't do nobody no wrong." (32 RT 15228-29.) Standing over Sherry, appellant stated, "just let me do this then" – indicating intercourse. (32 RT 15229.)

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28. That this was the residence at 2523 19th Avenue was confirmed by the date (October 1986) (33 RT 15242), the route driven to reach the residence (see 32 RT 15214-16), and the fact Sherry saw on the ceiling the fishnet, containing underwear, as in appellant's bedroom on 19th Avenue (see 26 RT 13284-86; 32 RT 15222-23).

Sherry rose from the floor and exposed her vagina, and appellant bared his penis and placed it inside her vagina. (32 RT 15229, 15231-32.) Sherry laid on the bed, scared and crying and stating, "But I liked you, though. But I like you." Appellant lay atop Sherry and moved back and forth inside her, with the two of them ending on the floor again. (32 RT 15232.)[29/]

After "he finished," Sherry re-covered herself and stood by the door to the bathroom; appellant said he would drive her home. (32 RT 15233-34.) They left the residence and appellant drove them; Sherry ultimately had appellant drop her off at the intersection of 16th and V Streets. (32 RT 15235-36.) On the way, appellant had stated he would have money for Sherry on Tuesday. (32 RT 15236-37.) Appellant also admonished Sherry that she should not have been out on the street. (32 RT 15236.)

The severity of the strangulation was such that visible welts developed on Sherry's neck, and there was internal hemorrhaging in Sherry's eye. (32 RT 15239-40.)

In early 1987, Sherry saw appellant again. He was in a motel where Sherry had gone to "date" another man in pursuit of rock cocaine. (33 RT 15241-48.)

7. Assault On LaTonya C. (Counts XIII, XIV) And Second Degree Murder Of Cherie W. (Count XII)

A little less than two months after the eviction from the 19th Avenue residence, appellant unlawfully moved into the vacant residence at 3233 44th Street, and he would not be evicted until March 1987. This would be long enough for LaTonya C. to be strangled at the residence, and for Cherie W. to disappear and be buried at the residence.

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29. How Sherry and appellant ended up on the floor is not clear, but possibly may be due to the fact appellant slept on a waterbed. (26 RT 13204; 31 RT 14931.)

a. Interrupted Assault On LaTonya C.

LaTonya C.'s 22nd birthday was on January 29, 1987. (32 RT 15109, 15143.) LaTonya's sources of income included public assistance, proceeds from occasional theft and resale of goods, proceeds from prostitution by three women including LaTonya's girlfriend Casey H., and unspecified funds from LaTonya's unspecified husband. (32 RT 15111-14, 15171.) LaTonya occasionally used rock cocaine (32 RT 15110-11), but she was addicted to heroin after eight or nine years usage (32 RT 15109, 15115).

At about the noon hour on or about Monday, February 2, 1987,[30] LaTonya was on Broadway in the vicinity of the cemetery on that street. (32 RT 15121, 15126, 15143, 15168-69.) LaTonya was walking east, toward Oak Park. (32 RT 15123.) LaTonya's intended final destination was the residence of her cousin and her cousin's boyfriend, which was at "10th [Avenue] off of Stockton Boulevard." (32 RT 15121-22.)

LaTonya was without funds, and she planned to remedy that by first stopping by the motel where Casey was (32 RT 15171), but then LaTonya saw appellant driving nearby (32 RT 15122). LaTonya had met appellant at the local drinking establishment in 1986 (see 32 RT 15103, 15106-07), and since then appellant had occasionally purchased drinks for LaTonya in a bar setting and once or twice given her a ride in his truck (32 RT 15118).

On this day, appellant was driving a car. (32 RT 15120-21.) LaTonya flagged down appellant and asked him for a ride to 10th Avenue.

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30. LaTonya's birthday was on a Thursday, but more than one day had passed since then, and yet LaTonya was certain the day in question was a weekday. (See 32 RT 15143.) LaTonya at one point appeared to estimate that about three days had passed (32 RT 15169), but the third day after LaTonya's birthday would have been Sunday, February 1, 1987. Thus, from all the evidence, the jurors rationally could have inferred the greatest likelihood was that the day in question was Monday, February 2, 1987.

(32 RT 15122-23.) Appellant said he was "going out that way anyway," and he invited LaTonya to ride with him. (32 RT 15123.) As they drove, LaTonya suggested that appellant purchase a soda for her; appellant did not do so, and instead he said he needed to stop by his home. (32 RT 15125.) LaTonya suggested she could get some water there. (32 RT 15125.)

Appellant parked at 3233 44th Street but he left the engine running while the two of them entered the residence. (32 RT 15127-28.) They entered the residence, and then appellant went toward a back room while LaTonya entered the kitchen. (32 RT 15130-32.) LaTonya obtained water from a faucet, and she remained by the faucet while drinking. (32 RT 15131-32.) As she drank, appellant approached from behind LaTonya and placed a black, shoestring-like ligature around her neck; he began strangling her. (32 RT 15132-33, 15173.)

LaTonya struggled against appellant, and she bit him. (15134-35.) Appellant held his grip and told LaTonya he would have to kill her if she did not quiet herself, and he said, "I just want you to cooperate." (32 RT 15135.) LaTonya responded with profanity and demanded release. (32 RT 15135.) Appellant insisted, "Just be quiet. I don't want to kill you. Don't make me have to kill you." (32 RT 15136.) Appellant continued this strangulation until two girls entered the residence; with this interruption, appellant released his grip and LaTonya fled the residence. (32 RT 15136-37.)[31/]

As LaTonya walked toward her cousin's home, appellant pursued in his car and drove alongside her, saying he was sorry and asking for a chance to "talk." (32 RT 15137-40.) LaTonya's response was a profanity-laced threat that there would be vengeance once she reached her cousin's residence. (32 RT 15137, 15140.) Appellant stopped the car and stood inside the driver

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31. The strangulation left welts burns on LaTonya's neck which took weeks to heal. (32 RT 15134-35, 15141-42.)

door. (32 RT 15140.) LaTonya responded by picking up a soda bottle and threatening impact to appellant's skull. (32 RT 15140.) Appellant apparently did not approach; however, he only stopped following LaTonya as she neared the street on which her cousin lived. (32 RT 15140-41.) Once she reached her cousin's residence, LaTonya revealed what had happened, and she went with her cousin's boyfriend back to the 44th Street residence so the boyfriend could inflict physical injury on appellant. (32 RT 15140-41, 15183.)[32/]

Appellant's assault instilled in LaTonya a strong, lasting, expressive, and observable antipathy toward appellant. (32 RT 15156, 15176-79.)

b. Murder Of Cherie W.

(i) Disappearance Of Cherie W.

Cherie W. disappeared just a few days after appellant was unable to complete this assault on LaTonya.

Cherie's age was 26 years, her height was about 5 feet, 4 inches, and her weight was just over 100 pounds. (27 RT 13697, 13718; 4 Exh.-ACT 966-67 [Peo.'s Exh. 466].) Cherie and her sister Alicia Sullivan were severely addicted to rock cocaine, and they would use the funds each received from public assistance, as well as some funds from their grandfather, to support their addictions. (27 RT 13695-96, 13707-10, 13732.) However, Cherie would also engage in prostitution to obtain the additional funds necessary for rock cocaine. (27 RT 13709-10.)

Cherie left their home at about 9:30 p.m. on February 6, 1987, to sell or trade some of her sister's jewelry to obtain rock cocaine. (2713696-97, 13699, 13701.) Cherie departed wearing a yellow pajama top with roses, as well as jeans, a jacket, a scarf, and house shoes. (27 RT 13704.) As of midnight,

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32. At times, LaTonya would refer to the boyfriend as her "cousin" as well. (21 RT 15140, 15142.)

Cherie had not returned. (27 RT 13723.) By 12:30 a.m., Cherie's sister, accompanied by a friend, went searching for Cherie. (27 RT 13724.)

Two days later, on February 9, 1987, Cherie's sister reported Cherie to police as a missing person. (27 RT 13725-26.) Cherie's mother and sister made fliers advertising Cherie's status as a missing person. (27 RT 13720.) These fliers were posted around the Oak Park area within two weeks of Cherie's disappearance. (27 RT 13720; 28 13758-59.)

(ii) Death Of Cherie W.

On April 20, 1987, Cherie's body was recovered from a grave in the back yard at 3233 44th Street. (27 RT 13604, 13611, 13617; 28 RT 13949-51; 2 Exh.-ACT 383-84 [Peo.'s Exh. 128].) The body was on its side in the shallow grave, with about 12 inches of soil covering Cherie's feet and about 18 inches covering her upturned head. (27 RT 13622-23; 2 Exh.-ACT 407-08 [Peo.'s Exh. 140].) Cherie's body was clothed in the yellow pajama top, and otherwise nude. (27 RT 13621, 13640; 2 Exh.-ACT 419-20 [Peo.'s Exh. 145].)

Medical examination indicated the time since Cherie's death was "on the order of months." (28 RT 13966.) Excluded as possible causes of death were most forms of trauma to the body, many natural diseases, and fatal reaction to certain illegal narcotics other than rock cocaine. (28 RT 13980-81.) Among possible causes not excluded were asphyxia and fatal reaction to cocaine. (28 RT 13982-88, 14008.)[33/]

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33. Although Cherie was a frequent user of rock cocaine, on a small number of occasions she had suffered nonfatal but temporarily debilitating reactions after ingestion of rock cocaine. (27 RT 13712-15, 13739; 28 RT 13741.)

(iii) Appellant, Cherie, And 3233 44th Street

Appellant and his roommates were the only persons in control of the residence at 3233 44th Street from before Cherie disappeared, and until about one month before her body was found buried there.

Appellant had moved into the residence without permission as of December 20, 1986 (27 RT 13644-52, 13681), and his former housemate Ronnell Birdon, and Ronnell's girlfriend Michelle, had moved in with him a short time later (26 RT 13272, 13274; 27 RT 13653-54; 29 RT 14047).[34] Via judicial eviction proceedings commenced in January 1987, the unlawful occupation ended in the latter part of March 1987. (27 RT 13654, 13662-63.)[35]

Prior to this unlawful occupation, the premises had been vacant since mid-November 1986. (27 RT 13672.) Further, no one lived on the premises from the time of the eviction and through the date Cherie's body was unearthed. (27 RT 13639, 13672.)

The residence was near the intersection of 8th Avenue and 44th Street, where Cherie would frequently purchase rock cocaine. (27 RT 13633; 28 RT 13742-44, 13782-85.)[36] Further, appellant, Ronnell Birdon, and Michelle Sims smoked rock cocaine. (28 RT 13861.) Cherie visited the residence multiple times during the unlawful occupation, including a time when she and appellant were together in his bedroom at the residence. (28 RT 13754-57, 13788, 13811; 29 RT 14069-73; see also 28 RT 13808.)

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34. This residence was across the street from the residence of appellant's mother. (27 RT 13608-09.)

35. Appellant abandoned his vehicle at the residence. (27 RT 13604-05, 13638, 13689-90.)

36. Cherie's home was at 4440 10th Avenue. (27 RT 13693.)

Appellant and Ronnell had removed plastic paper,[37] which he remembered as being patterned in yellow and brown, from cabinets in the kitchen and from the bathroom of the residence. (32-RT 15004, 15007-08.) Scraps of plastic paper, colored in yellow, blue, and green, were found in Cherie's grave. (28 RT 13829, 14016.)

In a pre-arrest interview on April 20, 1987, appellant claimed he never did any digging in the back yard of the residence. (30 ACT 8972.) However, Ronnell Birdon had noticed fresh digging in the back yard during the unlawful occupation. (32 RT 15022; see 2 Exh.-ACT 389-90 [Peo.'s Exh. 131].)

8. Additional Facts

By his express admission to Celestine Stevens, appellant deemed all women to be bitches, whores, tramps, and sluts. (34 RT 15702-03.) Appellant considered prostitutes to be bitches, whores, and tramps; the reason he treated them "like that" was because that's why they were out there. (34 RT 15703.)

Appellant had a preference for sodomy. (34 RT 15704.) Appellant said he once "fucked a woman so hard she shitted on herself." (34 RT 15703.) He also said he "fucked the bitch so far in the ass that she shit herself." (34 RT 15704.) To police, appellant denied liking sodomy, and he denied ever engaging in sodomy with any person. (30 ACT 8057; 31 ACT 9027, 9037, 9094.)

* * *

Appellant rested without presenting witnesses regarding the charged offenses. (34 RT 15806.)

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37. Ronnell Birdon thought this could be described as wallpaper (32 RT 15007); however, there had been no wallpaper in the residence (27 RT 13683-84).

9. Priors Evidence (Bifurcated Court Trial)

Official documents reflect appellant was on July 1, 1971, and on April 18, 1977, separately convicted for the offenses of assault to commit rape (§ 220). (31 ACT 9164-66, 9181-84, 9174, 9176-77.)

C. Penalty Phase Evidence

1. Prosecution Evidence

a. Offenses Shown During Guilt Phase

The penalty phase evidence was substantially the same as in the guilt phase as to the second degree murder of Linda V. (see 60 RT 24150-84, 24200-31; 60 RT 24297 - 61 RT 24405), the first degree murder of Sheila J. (see 61 RT 24418-28, 24467-75), and the forcible sexual assaults on Melissa H. (see 59 RT 23858-42).

The penalty phase evidence was substantially the same as in the guilt phase as to the first degree murder of Yolanda J. (see 52 RT 21756 - 54 RT 22447; 55 RT 22770-76; 56 RT 22973-75), except that Vernell Dodson did not testify.

The penalty phase evidence was substantially the same as in the guilt phase as to the murder of Angela P. (see 54 RT 22448 - 56 RT 22909; 56 RT 22967-70), except as follows. During the week before the smell of Angela's body became prevalent, Charles Henry saw a man working on an old Nova or Maverick make car, medium green to light brown in color, while the car was parked near 3200 Sacramento Boulevard. (See 55 RT 22648-49.) A broken bottle neck found in the basement at that address bore Mark Chambers's fingerprints. (55 RT 22876-79.)

The penalty phase evidence was substantially the same as in the guilt phase as to the first degree murder of Maria A. (see 56 RT 22910-47; 56 RT 23072 - 57 RT 23217; 57 RT 23363-68; 61 RT 24443-46), except as

follows. LaChelle Whitfield recognized the sheets wrapped around Maria's body were from appellant's water bed. (60 RT 24302.)

The penalty phase evidence was substantially the same as in the guilt phase as to the first degree murder of Sharon M. (see 61 RT 24406-17; 61 RT 24632 - 62 RT 24701) and the forcible sexual assault on Sherry H. (see 59 RT 23943-24004; 60 RT 24094-98).

The penalty phase evidence was substantially the same as in the guilt phase as to the assault on LaTonya C. (see 58 RT 23760 - 59 RT 23856; 59 RT 24004 - 60 RT 24092; 60 RT 24100-19), except as follows. LaTonya's mother saw a rope burn on LaTonya's neck one day when they were behind Springer's Liquor Store. (60 RT 24122, 24129-31.) Hysterical and crying, LaTonya revealed that a friend had attempted to kill her. (60 RT 24131.) LaTonya showed her mother a house on 44th Street, where the attack had occurred. (60 RT 24131-32.) LaTonya said the friend, a man, gave her a ride when she was hitchhiking. The man stopped at the house to retrieve something, LaTonya entered to get water, and the man choked her from behind as she got the water. (60 RT 24132-33.) LaTonya fought and bit the man, and two girls entered. (60 RT 24133.) LaTonya's variation from these facts was the result of her fatigue in dealing with law enforcement, and her mother previously went along with the variation. (60 RT 24134-37.)

The penalty phase evidence was substantially the same as in the guilt phase as to the second degree murder of Cherie W. (See 57 RT 23467 - 58 RT 23750.)

b. Additional Offenses

(i) Aggravated Assault And Mayhem On Mary K.

On September 19, 1969, appellant engaged the professional date services of Mary K., who was aged 18 years and plying her trade at a bus stop in

Oakland. (62 RT 24801.) Appellant drove Mary to a darkened residential street and paid her, and Mary performed her services. (62 RT 24802.) Appellant then demanded his money back, placing a hook-style knife to Mary's throat to overcome her refusal. (62 RT 24802-04.) Mary agreed to give appellant the money if appellant would agree not to kill her, but appellant stated his express intent to kill Mary anyway. (62 RT 24804.) Mary screamed to attract attention and began to exit the car. While Mary got one leg out of the car, appellant used the hook-knife to gash open her thigh such that 23 stitches were required. (62 RT 24804-05.)

(ii) Forcible Kidnap, Assaults, Forcible Sexual Assaults, And Robbery of Virginia J.

In January 1971, when Virginia J.'s age was 21 or 22 years,[38] she had a "bad fight" with her husband. Virginia left their home and was living in a motel in Oakland. At about 9:30 or 10:00 p.m. a couple of nights later (on January 12, 1971), Virginia left her living quarters so she could eat. As Virginia walked along MacArthur Boulevard – through an area where there are many prostitutes – appellant came upon her from behind and abducted her into his car by threatening to shoot her. (62 RT 24753-56.) Appellant had propositioned Virginia before, but she had informed him she was not a prostitute. (62 RT 24756.)

In the car, appellant drove onto the freeway, then used his fist to "back hand[]" Virginia's mouth. Appellant took Virginia's purse and put it in the back seat. Forcing Virginia to remove her clothing as he drove, appellant transported

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38. Virginia was age 43 when she testified in June 1992. (62 RT 24753-54.) Thus, she apparently calculated in error when she testified that her age was 23 years in January 1971 (see 62 RT 24762.); if she was age 43 in 1992, then she was age 23 in 1972, and therefore she was age 22 in June 1971 – more than four months after the night of the abduction and assaults.

Virginia to a deserted area in the Oakland Hills. There, while inside the car, appellant attacked Virginia repeatedly. Appellant forced Virginia to orally copulate his penis. He forced her to lick his anus. He forced her to lick his testicles. (62 RT 24757-59; see 62 RT 24761.)

Appellant tried to sodomize Virginia, but without success. He forced his finger inside Virginia's anus. Appellant then raped Virginia. Appellant then forced his fingers inside Virginia's vagina, "extracted what was there" with his fingers, and forced his fingers inside Virginia's mouth to make her "swallow it." Virginia "spit it out." Appellant "did it again," and Virginia again "spit it out." Appellant then warned Virginia not to "do it again." (62 RT 24759-60.)

Appellant forced his fingers inside Virginia's vagina again. He withdrew his fingers and then pulled on her nipples. He punched her nipples. He berated her verbally. (62 RT 24760-61.)

At length, appellant inquired whether Virginia had "ever had sex with a dog." Virginia said no. Appellant said that when he was finished with Virginia, he would "find a dog." (62 RT 24761.)

Finally, appellant said, "What are we gonna do with you now?" Virginia said, "Well, I've done everything you wanted me to do, take me back to where you picked me up." Appellant then "kicked" Virginia, nude, from the car. Appellant said, "Bitch, you get back the best way you can." Appellant took from Virginia her rings and her watch, and he drove away with them and her other belongings. (62 RT 24761-62.)

Nude, Virginia trekked back to the road and then to the nearest house she could find, where a man gave her a blanket and notified law enforcement. (62 RT 24762.)

(iii) Kidnap For Rape, And Aggravated Assault, Of Dale W.

In 1971, Dale W. was a student at Alameda Junior College. On the night of May 17, 1991, Dale studied in the library at the University of California, Berkeley, until the library closed at 10:00 p.m. Dale then walked down Telegraph Avenue, hoping she could hitch a ride home. (60 RT 24191-92.) Before Dale made any effort, appellant drove alongside here and offered her a ride. When Dale asked appellant's destination, appellant said downtown Oakland. However, once Dale entered the passenger seat, appellant drove in a different direction on the freeway. (60 RT 24191-93, 24198-99.)

Dale asked what appellant wanted and where they were headed. Appellant said he wanted "sex," that Dale was to cooperate and she would not be harmed. Appellant then grabbed Dale's hair, and he pulled and held her head backward over the seat back so she could not see where he was taking her. (60 RT 24193.) Dale began praying loudly, hysterically, hoping appellant would be persuaded to end the abduction. Instead, appellant kept her head pulled back. After leaving the freeway, appellant had to release Dale's hair when he had to stop at a stop sign. However, he then grabbed her hair again and again held her head backward over the seat back. (60 RT 24194-95.)

Appellant drove onto a dirt road in an unknown area, and Dale tried to exit the car. Appellant "jerked" Dale back by her hair, preventing her exit. Dale then clawed at appellant's face, inflicting an injury that caused appellant to let go and put his hands to his face. (60 RT 24195-96.) Dale reached over and turned off the ignition, and then she threw the keys from the open passenger window. Dale then exited from the passenger side and fled from the car, which was still rolling. (60 RT 24196.)

Appellant exited from the driver side, and he pursued and overtook Dale. Appellant knocked Dale to the ground. He kicked Dale's face.

(60 RT 24196-97.) Appellant then had to run back to the car because it was still rolling. (60 RT 24197.)

Dale ran back to the road and to an electronically-fenced residence. Dale told the residents she was nearly raped, and they telephoned law enforcement and let Dale wait inside. The police arrived within five to ten minutes, and Dale was able to spot appellant, who was pushing his vehicle. (60 RT 24197-98.) On July 1, 1971, appellant was convicted in Alameda County Superior Court for assaulting Dale Walker with intent to rape (§ 220). (62 RT 24874-75.)

(iv) Assault, Battery, False Imprisonment, Forcible Oral Copulation, Auto Robbery, And Forcible Rape Of Connie S.

In October 1975, Connie S. was 21 or 22 years of age who often worked as a "[t]opless/exotic" dancer. (62 RT 24861, 24862-63.) Over the years, she also engaged "[o]ff and on" in prostitution. (62 RT 24862-63.) At about midnight on October 18, 1975, shortly after her release from county jail in Los Angeles, Connie arrived at the Bear Cave, a "topless dancing establishment" in San Jose. (62 RT 24861-62.) There, Connie did a "guest spot" performance, and then she mingled with the audience in search of a "date" so she could get gas money; Connie's intended final destination was San Francisco, where she intended to be employed as a dancer. (62 RT 24863-64.)

Appellant was there, and he and Connie agreed to a $25 "date." (62 RT 24864, 24873.) They separately drove to the trailer park where appellant resided and they entered appellant's trailer; appellant now had a dog – a Doberman pinscher. (62 RT 24865.) Inside the trailer, appellant paid Connie, they "dated," and then Connie began to don her clothing. (62 RT 24865-66.) Then, appellant strangled Connie from behind, using a chain. Appellant said, "You ready to die, bitch, you ready to die." (62 RT 24866-67.) Connie lost consciousness. (62 RT 24867.)

Later, Connie regained consciousness, to appellant's wide-eyed surprise. Appellant responded by urinating on Connie's face. (62 RT 24867.) Appellant then bound Connie's hands in front of her, using tape. Appellant forced Connie to put her legs between her arms, so that her legs were raised and her arms were bound together behind her knees; appellant bound Connie's ankles together in this position. (62 RT 24867-68.)

Appellant hoisted Connie as a bundle and put her on the bed. There, he forced her to orally copulate his penis. (62 RT 24868, 24870.) Appellant then left Connie bundled on the bed and he drove off in her car. Appellant returned within 30 minutes with Connie's purse, which had been in her car. Appellant made Connie reveal her identity, as Connie carried no identification. (62 RT 24868-69.) Afterward, appellant removed Connie's bindings and raped her repeatedly through the night. (62 RT 24869-70.)

In the morning, appellant taped Connie's legs to a chair in the kitchen, and bound her wrists behind her with wire. Appellant left the Doberman to guard Connie, warning her the dog would attack her if she moved. (62 RT 24870-72.) However, Connie was "pretty good with animals," and the Doberman remained seated as she worked her hands free and then used a knife to cut the tape from her legs. Then, Connie went next door and law enforcement was notified. (62 RT 24872.)

Almost two years later, on September 2, 1977, appellant would be convicted in Santa Clara Superior Court for aggravated assault (§ 245(a)) and false imprisonment (§ 236). (62 RT 24874.)

(v) Forcible Kidnap, Assault, Battery, Sexual Battery, And False Imprisonment Of Darlene

In 1976, Darlene's age was 18 years and she lived in her mother's Sacramento home on 7th Avenue near Stockton Boulevard. (62 RT 24764.)

At about 8:00 p.m. on December 6, 1996, Darlene left home and went walking because she was having difficulty with her boyfriend (and future husband) Patrick G. (62 RT 24764, 24767.) As Darlene walked down Stockton, between 7th and 8th Avenues, appellant came upon her from behind and, while choking her, dragged her into a car. (62 RT 24765-66, 24769-70.) Appellant choked Darlene until she lost consciousness. (62 RT 24766.)

Appellant asported Darlene to a house on 44th Street, at 8th Avenue, and he dragged her inside. (62 RT 24766.) Inside, appellant rendered Darlene nude from the waist down. (62 RT 24768-69, 24774.) Then, using an automotive fan belt, appellant silently beat Darlene, whipping her body from head to toe. (62 RT 24767-68, 24770, 24777.) Appellant told Darlene he would kill her if she screamed. In fear, Darlene did not scream or cry for help. (62 RT 24776.)

Afterward, appellant used his penis to strike Darlene's face. (62 RT 24770.) Appellant stated his intent to "jack off in [Darlene's] face and fuck [her] in [her] butt." (62 RT 24770.)

Eventually, appellant bound Darlene. He taped her wrists and, using rope and shoelaces, he bound her so that her wrists were behind her feet. In this condition, appellant left Darlene in the closet overnight. (62 RT 24767, 24771, 24777.) In the morning, a woman, addressing appellant as "Junior," told him to get ready for work. Darlene had loosened her bindings over the course of the night. Appellant checked the bindings and re-tightened them, warning Darlene that he would kill her if she removed them. Appellant then departed. (62 RT 24772.)

While appellant was away, Darlene loosened the bindings from her feet and made her way to the kitchen. A razor blade which she found there proved largely ineffective on her remaining bindings, but flame from the gas range accomplished her release. (62 RT 24773.) Darlene then obtained a knife from the kitchen, she enabled the night chain on the front door, and she went back

to the bedroom to put on her clothing. As Darlene was putting on her pants, appellant opened the front door, but the chain prevented the door from being fully opened. Appellant then kicked open the door. (62 RT 24773-74.) Darlene brandished the knife and warned appellant to stay away. Appellant jumped back, and Darlene fled to her mother's home, which was only about two blocks away. (62 RT 24774.)

The following year, on April 18, 1977, appellant was convicted in Sacramento Superior Court for assault with intent to rape (§ 220) and false imprisonment (§ 236). (62 RT 24874.)

(vi) Foreign Thefts

On January 31, 1984, appellant was convicted on three counts of grand theft in Arizona. (62 RT 24874.)

2. Defense Evidence

a. Facts

(i) Facts Based On Personal Knowledge Of Appellant

a) Pre-adult Years

As to appellant's childhood, Martha Dickerson was appellant's cousin. (62 RT 24891.) When Dickerson was eight years old she lived with her grandfather, her Aunt Bertha (appellant's grandmother), and her cousins Carl and appellant in a house in Albany, Georgia. (62 RT 24892-93.) Carl is appellant's older brother. (62 RT 24893, 24897-98; 65 RT 25611.) Appellant's age was then about two years. (62 RT 24894-95.) At times, appellant's mother fought her husband while breast feeding appellant. (62 RT 24895.) There were always "knock down shoot-out battle fights" going on. (62 RT 24895-96.) Bertha was vicious and evil. (62 RT 24898.)

Bertha beat Dickerson from the time Dickerson got up in the morning to the time she went to bed. (62 RT 24898.) She needed no reason. (62 RT 24900.) Bertha beat her own father (Dickerson's grandfather). (62 RT 24899.) She beat appellant daily during his infancy. (62 RT 24899, 24902.) Bertha beat her victims with them nude, standing on a stool, and in front of the other children. (62 RT 24902.) There was no love in the home. (62 RT 24908.)

Marjorie Eason was Martha Dickerson's sister and appellant's cousin. (62 RT 24910.) She first met appellant when she was 13 and he was 15; she met him when she moved in with her Aunt Bertha. (62 RT 24911.) Appellant and his brother Carl already lived there. (62 RT 24912.) Eason was there for approximately three years. (62 RT 24924.) Eason saw Bertha beat appellant and Carl with an extension cord. (62 RT 24913.) The beating victims were nude. (62 RT 24913.) Appellant was beaten so hard he bled. (62 RT 24921.) Bertha made appellant stand in a corner on one leg when he mispronounced words. (62 RT 24915-16.) Once, Bertha tied appellant's hands around the pole of the bed. (62 RT 24922.)

As to appellant's teen and adult years, Josea Parham first met appellant when Parham moved to Isleton in 1955. (62 RT 24930.) Appellant's grandmother was nice, and appellant supported her by doing different things. (62 RT 24933.) Appellant's parents were strange. (62 RT 24934.) Appellant was a normal boy although he was kind of a loner. (62 RT 24934, 24937.) Appellant's brother Carl seemed mentally retarded. (62 RT 24935.)

Augustin Mandujan knew appellant when appellant was beginning high school. (62 RT 24940.) Both rode the bus together from Isleton and played in the band. (62 RT 24943.) Appellant always tried to get along with people, but sometimes he tried too hard. (62 RT 24944.) Appellant safeguarded Carl. (62 RT 24946.) Appellant was "wimpy" and not aggressive, and he endured

teasing. (62 RT 24947-48.) The few times Augustin saw appellant's mother, she was very hard on appellant. (62 RT 24949.)

John Mandujan was Augustin Mandujan's brother. (63 RT 24977.) He saw appellant get angry only if Carl was teased in excess. (63 RT 24980.)

Julie Parham-Cotton knew appellant in Isleton when they were both in their teens; appellant was about four years her senior. (62 RT 24954.) Appellant's family was called "the weirdo family." (62 RT 24955.) Appellant's mother was loose, enjoying the company of many men. (62 RT 24956.) Appellant behaved inappropriately toward girls, including leaving his fly open. (62 RT 24957-58.) Appellant bit the lip of a friend of Parham-Cotton's. (62 RT 24958-59.)

Barbara Shearer-Honaker attended high school with appellant. (62 RT 24965.) They were in the band together. (RT 24966.) Sometimes appellant tried to kiss her, but she told him to leave her alone and he did not push it. (62 RT 24967.) Appellant was lots of fun. (62 RT 24967.)

Harvey Felt was appellant's freshman teacher. Appellant was an average student. (62 RT 24985.) Only three or four of the students in the school were Black. (62 RT 24986.)

Henry McKinney grew up with appellant in Isleton. (63 RT 25003.) As kids, they were good friends. (63 RT 25007-08.) Appellant's mother was "very strange" and "kind of evil." (63 RT 25008.) Her conduct included not allowing appellant to come out and play, disfavoring his attendance at dances, setting a 9:00 p.m. curfew, and making appellant study. (63 RT 25008-09.)

b) Young Adult, Before Viet Nam

Helen Hodge met appellant when he was out of high school. (65 RT 25599.) Appellant was considered one of the family. (65 RT 25599.) On one occasion, appellant rented a bus and took people from Hodge's church to San Francisco. (65 RT 25602.)

James Hodge met appellant when they both attended Delta College. (65 RT 25625.) They became very close. (65 RT 25627.) Appellant told James he never knew his father. (65 RT 25628.) Appellant's mother was strange and unhappy. (65 RT 25628-25629.) Appellant's grandmother was friendlier. (65 RT 25629.) Appellant treated his grandmother like she was the boss, and he always tried to please her. (65 RT 25629.)

Maryanne Fields was Helen Hodge's daughter and five or six years appellant's junior. (65 RT 25615.) Appellant always gave rides to Maryanne and her friends. (65 RT 25617.) Appellant bought gifts for Maryanne and he gave her an engagement ring, but she wanted to be just friends. (65 RT 25619, 25621.) Appellant was friendly and nice. (65 RT 25621.)

Appellant worked hard and was a very good mechanic. (63 RT 25013.) He moved railroad machine pipes, repaired cars, and did carpentry work. (63 RT 25013.) Women liked appellant for the gifts he gave. (63 RT 25014.) Appellant was generous with his money. (63 RT 25015.)

Appellant became a driver and mechanic for a bus company. (RT 25017.) He helped John Mandujan get a job as a driver with the company. (62 RT 24981.) Appellant was John's supervisor and he was a very good worker. (62 RT 24982.)

Before going to Viet Nam, appellant was kind, outgoing, and outspoken. (63 RT 25017.) Per James Hodge, appellant was happy-go-lucky prior to induction. (65 RT 25630.)

c) Viet Nam

To Motor Sergeant Carrol Crouse, appellant presented as an outstanding individual in 1966 prior to duty as a mechanic in Viet Nam. (64 RT 25303-04, 25306, 25315.) Camp Enari, where they were stationed, was a stressful environment. (64 RT 25310-13.) Appellant was never shot at, but convoys were still stressful because the Vietnamese persons one encountered on the

roads could be enemy agents. (64 RT 25321-22, 25325.)

Appellant also served at the fire bases. (64 RT 25322-23.) Crouse was comfortable with appellant at a fire base because Crouse trusted appellant. (64 RT 25324.)

The noise made by appellant during a February 15, 1967 mortar attack on the U.S. camp awakened Crouse from slumber. (64 RT 25327-28.) That may have saved Crouse's life. (64 RT 25328.)

Gary Harris was in Camp Enari, and he met appellant when both of them assisted occupants of a vehicle flipped over by a road mine. (64 RT 25331, 25333.) At Camp Eneri, appellant was a good mechanic and a good man. (64 RT 25335.)

Prostitutes abounded. (64 RT 25325; see 64 RT 25296.) Appellant partook. (64 RT 25326.) The prostitutes were diseased and some were enemy agents. (64 RT 25298-25300.)

d) After Viet Nam

When appellant returned from Viet Nam he was not the same loving person he was before he left. (65 RT 25605.) He was distant (65 RT 25630), a liar (65 RT 25606), violent, aggressive, and "evil-tempered" (63 RT 25018, 25020; 65 RT 25621-22), and prone to ducking due to loud noises (63 RT 25018, 25021). He did not pay his bills, so Helen and her husband had appellant live with their family, an arrangement lasting about six months. (65 RT 25607, 25612-13.) He did not pay his parking tickets, so he went to jail, which was sad. (65 RT 25607-08.)

Helen met Bertha, who was nice. (65 RT 25611-12.) Appellant respected Bertha. (65 RT 25612.)

After appellant got married, McKinney went over to his house in Oakland. (63 RT 25021-22.) After appellant's divorce, McKinney saw appellant in Stockton. (63 RT 25023.) Appellant had prostitutes in his truck

and he seemed fairly happy. (63 RT 25024-25.)

Later, in San Quentin State Prison, appellant had a good attitude and good work habits in the prison's furniture factory. (65 RT 25580, 25583.) Appellant did not use the tools as weapons. (65 RT 25588.)

e) Sacramento

In Sacramento, appellant was very protective of LaChelle Whitfield and was very soft hearted. (57 RT 23347, 23348.) Whitfield never saw appellant lose his temper, although he did get upset with her, argue with her, and threaten to "kick [her] ass." (57 RT 23358.) Appellant always cared for her and put her first. (57 RT 23354.)

Appellant respected Stephanie Sheppard and treated her like a lady. (58 RT 23736.) He gave her money, a place to stay, and rides. (58 RT 23749-50.) They never argued. (58 RT 23750.)

(ii) Facts Not Based On Personal Knowledge Of Appellant

Shad Meshad was a licensed clinical social worker and president of the Vietnam Veteran's Aid Foundation. (63 RT 25276.) He served in Viet Nam and works with veterans, particularly with readjustment problems. (63 RT 25277.)

Meshad reviewed appellant's military records but did not meet him. (63 RT 25282-25283.) During appellant's duty at Camp Enari, there was a lot of activity in military installations. (63 RT 25283.) There were a lot of combat missions. (63 RT 25284.) Many servicemen died. (64 RT 25294.)

Appellant was assigned to the motor pool. (64 RT 25293.)

b. Opinions

(i) Opinions Based On Personal Knowledge Of Appellant

Augustin Mandujan opined appellant should be removed from society but not killed. (62 RT 24952.)

Shearer-Honaker opined appellant should be counseled so he could be imprisoned for life. (62 RT 24975.)

Pam Suggs opined appellant had "kind of a mental problem" (56 RT 23035) and was "not wrapped tight at times" (56 RT 23036).

Crouse believed appellant should be credited with saving Crouse's life, and therefore appellant should not be killed. (64 RT 25329.)

Gary Harris believed appellant helped save four soldiers and therefore he should not be killed. (64 RT 253441.)

Helen Hodge asked the jury not to sentence appellant to death. (65 RT 25611.)

(ii) Opinions Not Based On Personal Knowledge Of Appellant

a) Brad Fisher, Ph.D.

Brad Fisher, a clinical forensic pathologist, generally testifies for the defense. (63 RT 24990, 25088.) In his opinion, child abuse is an important element in an evaluation of criminal behavior as an adult. (63 RT 24996.) Abuse can produce difficulties in three ways: (1) the anger of being beaten as a child stays with the individual, (2) the abuse becomes a learned behavior, and (3) the abuse can produce physical symptoms like hyperactivity or speech disorders. (63 RT 24998-99.) Such abuse does not cause serial murder, but may be a factor in serial commissions of murders. (63 RT 25159.)

Fisher evaluated appellant, having interviewed him four times. (63 RT 24996, 25028.) Fisher spoke to appellant's mother, Martha Dickerson, Marjorie Eason, Dr. William Vicary, and (briefly) school teachers and a principal. (63 RT 25028-29.) Fisher reviewed case records, school records, prison investigative reports, and some transcripts. (63 RT 25028-30.) Fisher did not test appellant in any way. (63 RT 25128.)

Appellant's intelligence was average to above-average. (63 RT 25140, 25141, 25222.)

In Fisher's opinion: appellant was abused before his birth and until his duty commenced in Viet Nam in 1966 (63 RT 25035, 25037); appellant's parents beat each other (63 RT 25035); appellant's parents were frequently absent during appellant's infancy, and appellant was neglected and abused while residing with Bertha (63 RT 25035-36); the abuse of appellant was lengthy, extreme, multi-generational, emotional, mental, and physical (63 RT 25049); appellant's mental problems were related to the abuse (63 RT 25049-50); appellant's crimes were strongly linked to the abuse (63 RT 25054); appellant could conform his conduct to rules and regulations (63 RT 25222); appellant could think abstractly and was intelligent, and he had a good memory and an engaging personality (63 RT 25222); appellant had limited self-control (63 RT 25243); appellant knew it was wrong to kill somebody (63 RT 25244); appellant is a liar (63 RT 25206) and a manipulator who seeks to avoid responsibility (63 RT 25246); and, it is possible that the consequence of prior incarceration in prison taught appellant he should avoid additional consequences by killing his victims (63 RT 25255).

Fisher would not describe as unalterable any opposition he has to the death penalty. (63 RT 25089.)

b) John Wilson, Ph.D.

John Wilson, a clinical psychologist, specializes in post-traumatic stress disorder. (64 RT 25342-43.) Wilson reviewed appellant's military records, probation reports, results of psychological testimony, transcripts and summary reports written by investigators. (64 RT 25344.) He once met with appellant for three hours. (64 RT 25415.)

Many veterans of the Viet Nam war suffered from post traumatic stress disorder. (64 RT 25358.) Appellant may or may not suffer from the disorder. (64 RT 25353, 25427-28.) Appellant does not meet the full diagnostic criteria for the disorder. (64 RT 25427.) Some traits reportedly displayed by appellant include exaggerated startle response and hypervigilance. Persons suffering from the disorder may display those traits. (64 RT 25353.)

In Wilson's opinion: appellant's family is highly dysfunctional and his experience was extremely traumatic (64 RT 25350); appellant was abandoned by both parents and raised by his grandmother Bertha who was sexually sadistic and brutal in her random beatings (64 RT 25350); one raised in such an environment commonly learns hostility, low self-esteem, numbness, repression, and dissociation (64 RT 25357, 25370, 25380-81); the hostility will resurface (64 RT 25358); such a person is more inclined toward substance abuse (64 RT 25363); such a person is particularly vulnerable to the stressors indigenous to the war zone (64 RT 25351) and in fact appellant was exposed to numerous stressors in Viet Nam (64 RT 25387-88); Viet Nam differed from other wars because it was a guerilla war fought by soldiers who averaged 19 years of age, the identity of enemy agents was difficult to discern, morale was low because troops rotated in and out frequently, and returning soldiers received no homecoming, counseling, or deprogramming (64 RT 25345); appellant has antisocial personality disorder (64 RT 25410, 25465); appellant likes to use other persons for his own "games" (64 RT 25557); appellant takes pleasure in

humiliating, sodomizing, and victimizing, and inflicting harm on prostitutes (64 RT 25470, 25487); once he "engages in that mode of functioning," appellant lacks free will to prevent its violent consummation (64 RT 25467, 25470-71) unless, for example, the victim resists or appellant might get caught (see 64 RT 25480-81); and, if appellant had been screened accurately after his return from duty, and treated, he would not have committed any of his crimes (64 RT 25361).

Wilson was disinclined to believe statements by appellant which were inconsistent with Wilson's theories. (64 RT 25461.) Wilson was unfamiliar with many of the facts of appellant's offenses and the surrounding circumstances. (64 RT 25474, 25480, 25490, 25494.)

c) Leon Marder, M.D.

Leon Marder, medical director and chief psychiatrist for a County Mental Health Program in Santa Barbara (65 RT 25632, 25637), has expertise in cocaine and cocaine use. (65 RT 25637-25638.)

Cocaine is a stimulant. (65 RT 25645.) Cocaine toxicity is in three stages. (65 RT 25657.) Stage one is euphoria, which is a feeling of great pleasure, increased alertness, and increased intellectual activity. (65 RT 25657-60.) There is also a proclivity for a low level of violence. (65 RT 25660.) Stage two is dysphoria, the opposite of euphoria. (65 RT 25665.) The person is miserable and anxious. (65 RT 25665.) The person experiences an intensified form of depression called melancholy. (65 RT 25665.) The energy level disappears but aggression is more marked and the insomnia is intolerable. (65 RT 25665-25666.) Paranoia and delusion persist. (65 RT 25665-66.)

Stage three is psychosis. (65 RT 25671.) In this stage, negative feelings from stage two intensify and increase. (65 RT 25671.) Hallucination is possible. (65 RT 25671.) The person becomes very restless and irritable. (65 RT 25672.) In the major level of this stage, the person may develop a schizophrenic-like disease. (65 RT 25673.) The person also develops repetitive behavior. (65 RT 25673.)

If a person typically responded to certain behavior by becoming violent, cocaine use would intensify that response. (65 RT 25679, 25686.) Intoxicants undermine the will. (65 RT 25683.) If cocaine use has caused sensitization of the nervous system, anything in the environment can set the person off, even if one has not ingested cocaine for some time. (65 RT 25687.)

Marder did not interview appellant. (65 RT 25739.) Marder did not know about appellant's crimes. (65 RT 25742.) Marder offered no opinion regarding appellant and cocaine's effect on appellant in particular. (65 RT 25744, 25748.)

c. The Future

Life inmates can work in prison. Death row inmates cannot. (65 RT 25593-94.)

ARGUMENT

I.

APPELLANT'S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE MUST BE DENIED

Appellant asserts no substantial evidence supports the jury determinations that his murders of Sheila J. (count 2), Yolanda J. (count VII), Maria A. (count IX), and Sharon M. (count X) were murders of the first degree (§ 190). Specifically, he asserts the evidence provided no basis for a rational inference that those murders were the product of premeditated and deliberate intents to kill. (AOB 125-61.) Appellant does not prove this assertion.

A. The Laws Of Evidence And Murder

A claim of insufficiency of evidence questions only whether "in light of the whole record . . . any rational trier of fact could have found the essential elements beyond a reasonable doubt." (*People v. Davis* (1995) 10 Cal.4th 463, 510; *People v. Sanchez* (1995) 12 Cal.4th 1, 31; see *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) To be sufficient, evidence presented at trial need only "reasonably justify the trier of fact's findings" (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Cain* (1995) 10 Cal.4th 1, 39) when viewed in the light most favorable to the People, and presuming in support of the conviction every fact reasonably deducible from the evidence (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Berryman* (1993) 6 Cal.4th 1048, 1083).

"[A]n appellate court must indulge in every presumption necessary to uphold a judgment" (*In re Saldana* (1997) 57 Cal.App.4th 620, 627), one such presumption being "'the presumption that the record contains evidence to sustain every finding of fact'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881), a presumption applicable even in criminal cases (e.g., *People v. Davis* (1968) 263 Cal.App.2d 623, 627; *People v. Byrd* (1960) 187

Cal.App.2d 840, 842-843; *People v. Walker* (1959) 170 Cal.App.2d 159, 163; *People v. Thompson* (1934) 3 Cal.App.2d 359, 362). A defendant seeking to rebut this presumption must affirmatively "'demonstrate that there is *no* substantial evidence to support the challenged findings.'" (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881, original emphasis; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.)

The "minimal" evidentiary showing compelled by the state and federal Constitutions (*People v. Yarber* (1979) 90 Cal.App.3d 895, 911) is satisfied if *some* trier of fact rationally could have found the challenged inference to be the "most reasonable" interpretation from the evidence. (*Lavender v. Kurn* (1946) 327 U.S. 645, 653; accord *Webb v. Illinois Cent. R. Co.* (1957) 352 U.S. 512, 515, fn. 6; *People v. Perez* (1992) 2 Cal.4th 1117, 1127; *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1018.)

It is permissible – and virtually inevitable – that a verdict may have "involved speculation and conjecture" (*Lavender v. Kurn*, *supra*, 327 U.S. at p. 653):

> Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is *required* on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a *complete absence* of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to *discard or disbelieve whatever facts are inconsistent* with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

(*Lavender v. Kurn*, *supra*, 327 U.S. at p. 653, emphasis added.)[39/]

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39. This determination of the existence of substantial evidence applies as well in criminal cases, wherein such substantial evidence must persuade the trier of fact beyond a reasonable doubt. (E.g., *People v. Berti* (1960) 178

While the elements of first degree murder are familiar, it may be helpful to point out the relatively uncomplicated nature of the offense:

"Murder is the unlawful killing of a human being, . . . with malice aforethought." (§ 187(a).)

"Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188 [1st para.].)

"When it is shown that the killing resulted from the intentional doing of an act with express . . . malice as defined above, no other mental state need be shown . . . ." (§ 188 [2d para.]; *People v. Rios* (2000) 23 Cal.4th 450, 460.)

"All murder which is perpetrated . . . by any . . . kind of willful, deliberate, and premeditated killing, . . . is murder of the first degree; . . ." (§ 189 [1st para.].)

"To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected on the gravity of his . . . act." (§ 189 [4th para.].)[40/]

Rather,

> "premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." . . . The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration

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Cal.App.2d 872, 875-877; *United States v. Manuel-Baca* (9th Cir. 1970) 421 F.2d 781, 782-783; *United States v. Nelson* (9th Cir. 1969) 419 F.2d 1237, 1243 & fn. 15; *Shibley v. United States* (9th Cir. 1956) 237 F.2d 327, 331; *Stoppelli v. United States* (9th Cir. 1950) 183 F.2d 391, 393, fn. 2.)

40. "The statute's elimination of the need to prove mature and meaningful reflection was a legislative abrogation of *People v. Wolff* (1964) 61 Cal.2d 795, 819--822 [], which had imposed such a requirement. (See *People v. Swain* (1996) 12 Cal.4th 593, 616 [] [the 1981 amendment to section 189 overruled *Wolff*].)." (*People v. Smithey* (1999) 20 Cal.4th 936, 979.)

> of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ."

(*People v. Mayfield* (1997) 14 Cal.4th 668, 767, citations omitted.)

Appellant fails to demonstrate a "complete absence of probative facts to support" a conclusion that his murders of Sheila, Yolanda, Maria, and Sharon were intentional, that appellant considered killing each of these women before he intentionally killed them, and that his serial intents to kill included careful thought and resolution of reasons for and against killing them.

B. Factual Discussion

1. Appellant Killed Linda, Sheila, Yolanda, Maria, Sharon, And Cherie

While appellant declines to offer any actual challenge to the jury's determination that he committed the killings and that his killings were indeed murder, it is nonetheless helpful to commence analysis of the evidence at that beginning. The jurors logically could find the first question presented was whether in fact the deaths of Sheila, Yolanda, Maria, and Sharon could even be attributed to appellant. In answering the question, the jurors naturally would consider, as well, the deaths of Linda V. and Cherie W. A brief overview of a fraction of the evidence would suffice to resolve these issues of identity and causation.

Linda was alive and then disappeared in mid-February 1986. (31 RT 14836-37, 14841-42.) Linda died at about that time. (31 RT 14798-14802; 30 RT 14604-05.)[41/] Linda's body was buried (by inference, near the

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41. Apart from the medical evidence regarding time since death, the jurors had their common sense from which to conclude that Linda and the others were dead a short time after they disappeared. Apart from the medical evidence, it would have been plausible that each of their disappearances resulted from the fact each had simply left the Oak Park area – were it not for

time she died) in the back yard at 4237 Broadway (sometimes herein, the "Broadway residence"). (29 RT 14194.) Sheila was alive and then disappeared in mid-March 1986. (29 RT 14173, 14189, 14332-34, 14348.) At about that time, Sheila died (30 RT 14553; 31 RT 14798-14801) and her body was buried in the back yard at the Broadway residence (29 RT 14193).

Appellant lied about his connection to the Broadway residence. In February and March 1986, appellant lived at the Broadway residence. (29 RT 14145-47; 30 ACT 8991, 8898.) Appellant lied in June 1986 in an attempt to conceal from police that he resided at the Broadway residence (19 RT 11213-14), and he would later lie about why he was seen digging in the back yard at that residence (29 RT 14274-75; 30 RT 14377; 31 ACT 9042, 9045, 9047, 9050).

Yolanda was alive and then disappeared in mid-June 1986 while appellant had exclusive access to the residential quarters of the structure at 3445 4th Avenue (sometimes, the "4th Avenue structure"). (19 RT 11090, 11094, 11142-43, 11152, 11159, 11177; 21 RT 11764-65, 11780; see 20 RT 11445, 11450, 11453-61, 11486.) At just about the same time, Yolanda died (20 RT 11560-61, 11565, 11576-77) and her body was left inside residential quarters of that structure (19 RT 11016-17, 11041, 11180).

Again, appellant lied, falsely stating his connection to the victim and the location of the body. On the scene of the official discovery of Yolanda's body, appellant gave a false name (18 RT 11017-18; 19 RT 11288-89; 21 RT 11751), he falsely stated the structure had been unlocked when he entered and

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the fact that their bodies were found in Oak Park. Under the departure scenario, each would have had to be killed (or die without being killed) immediately upon returning to the Oak Park area (so that no witness ever knew of their return after disappearance) and each body buried or otherwise concealed in a place connected to appellant. Jurors reasonably could find that was not the most reasonable interpretation of the evidence.

"discovered" the body (19 RT 11296; 21 RT 11715-16; 30 ACT 8824, 8984), and he falsely denied he had been there more recently than two day (21 RT 11753), eight days (Peo.'s Exh. 363), or nine days (21 RT 11760-63) before (see 20 RT 11410-12, 11414). Then and thereafter, appellant lied about his recognition of Yolanda's corpse (19 RT 11200-02, 11295, 11311; 21 RT 11755; see 30 ACT 8960) and as to what he was doing at the residence (30 ACT 8823, 8843, 8951-52, 9065-66; 31 ACT 9062-64).

Maria was alive in early September 1986. (27 RT 13691-92.) She would be dead by about mid-December 1986 – about three months before her body would be discovered, on March 19, 1987, buried in the back yard of the residence at 2523 19th Avenue (sometimes, the "19th Avenue residence"). (24 RT 12728-29; 25 RT 13069; 26 RT 13344-51.) Sharon was alive and then disappeared in mid-September 1986. (33 RT 15515-16, 15521-22, 15530; 34 RT 15569, 15590-95.) Sharon would be dead by about late October 1986 – about six months before her body would be discovered, on April 28, 1987, buried in the back yard of the 19th Avenue residence. (33 RT 15462, 15468-69, 15539-40; 34 RT 15552-54.)

Appellant was part of the tenancy at the 19th Avenue residence by August 1986 (26 RT 13194-95, 13199, 13319, 13201-02, 13230; 27 RT 13691-92; see 31 ACT 9008-090), and no other tenancy was at the residence from then and until the bodies of Maria and Sharon were recovered from the back yard (24 RT 12749-50; see 26 RT 13344-51). Again, appellant lied about his connection to the location where the bodies were found. By calculated omission, appellant denied having been a resident at the 19th Avenue residence. (30 ACT 8870-72.) After the failure of this lie by omission (see 30 ACT 8876), appellant lied in an attempt to place himself away from the residence as early as possible. Appellant falsely stated he left the residence in September 1986 (30 ACT 8876-77), and later he falsely stated he left the

residence before September 1986 (31 ACT 9080; see 31 ACT 9012). In fact, the tenancy ended by eviction in late October 1986. (26 RT 13242, 13244, 13247.) Also, appellant lied about his connection to Maria, falsely claiming he did not know her (30 ACT 8955; see 27 RT 13602-03; 31 ACT 9026) when in fact he had long known her and had dated her romantically (20 RT 11483-84, 11510-11; 22 RT 12103-04, 12143; 31 RT 14668-69; 34 RT 15696-98, 15700, 15706, 15717).

Cherie was alive and then disappeared in early February 1987. (27 RT 13696-97, 13699, 13701, 13704, 13723.) At about the same time, Cherie died (28 RT 13966; see 28 RT 13949-51), and her body was buried in a grave in the back yard at 3233 44th Avenue (27 RT 13604, 13611, 13617; 28 RT 13949-51).

At all times in February 1987 and until eviction in late March 1987, appellant was part of an unlawful occupation of the 44th Avenue residence, and no one else occupied the residence through the date Cherie's body was discovered. (See 27 RT 13644-52, 13654, 13662-63, 13639, 13672, 13681; see 26 RT 13272, 13274; 27 RT 13653-54; 29 RT 14047.) This time, appellant falsely denied digging in the back yard at the residence. (30 ACT 8972; see 32 RT 15022.)

In evidentiary sum, the jurors were advised that six women were found deceased, their bodies concealed in a manner demonstrating their deaths were the result of criminal conduct, the common human link among them was appellant, and appellant lied in some way or many ways about his connection to all of them. A rational juror could find the "most reasonable" inference to be drawn from this evidence was that appellant killed all six women.

2. Appellant Murdered Linda, Sheila, Yolanda, Maria, Sharon, And Cherie

Not much more deliberation was required to find appellant's killings of all the six women were intentional, and that all the killings amounted to murder. Perhaps it is plausible in the abstract that one might accidentally kill one woman under circumstances necessitating concealment of the body, or at the far extreme possibly two. But, a juror rationally could reject the possibility that three women could die by accident under such circumstances, let alone six. Rather, a rational juror could find that when appellant killed these women, there could be no question that he killed at least four or five of them intentionally. Further, given four or five intentional killings, and the reasonable view that even one criminal killing[42] by accident (rather than intention) may be possible but not terribly likely, a rational juror could find the most reasonable interpretation of the evidence was that appellant intentionally killed all six women.

Moreover, common sense indicates that the cause of death, when death occurs by accident, is likely to be something detectable – typically, something which induces death by trauma. A too-vigorous blow, an accidental gunshot, a misplaced edge of a blade – these all might be expected to lead to accidental death, but they likewise are detectable. As to the women appellant killed, a traumatic cause of death was not indicated, and it was generally excluded. (See 30 RT 14599-14601, 14605-07 [Linda]; 30 RT 14581-84 [Sheila]; 20 RT 11615-16 [Yolanda]; 26 RT 13368-69 [Maria]; 34 RT 15551-52, 15555, 15557-58, 15563 [Sharon]; 28 RT 13980-81 [Cherie].) A rational juror could struggle in vain to imagine a plausible scenario in which a person intentionally kills four or five women by means undetectable after death, but just happens to unintentionally kill one more woman, or two of them, by means which also are

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42. I.e., a killing that would prompt concealment of the body.

not detectable at death.

In truth, the jurors did not have to wonder in the abstract about cause of death. Asphyxiation was not excluded as a possible cause of death for any of the six victims. (See 30 RT 14599-14601, 14605-07 [Linda]; 30 RT 14581-84 [Sheila]; 20 RT 11581-83, 11613-26, 11638-40, 11651 [Yolanda]; 26 RT 13367-68, 13388 [Maria]; 34 RT 15564-68, 15571-72 [Sharon]; 28 RT 13982-88, 14008 [Cherie].) Further, appellant's preference for the debilitating powers of oxygen-deprivation was known to the jurors through the testimony of Sherry (32 RT 15225-26) and LaTonya (32 RT 15132-33, 15173). Nothing more was needed for the inference to become entirely reasonable that appellant intentionally killed all six women by asphyxiation.

That likewise answers the question whether the killings were murder. An intentional and unlawful killing may be reduced from murder to manslaughter in the event there is evidence sufficient to raise a reasonable doubt that the killing was "upon a sudden quarrel or heat of passion" (§ 192(a)), or premised on an actual but unreasonable belief in the need to use deadly force in defense (*People v. Ochoa* (1998) 19 Cal.4th 353, 423; *People v. Barton* (1995) 12 Cal.4th 186, 200-201). But there was no such evidence, at all, of either in this case.

Further, even if one intentional killing might be attributable to such a cause, a rational juror could find it implausible that twice, and more, during the space of one year appellant found himself in circumstances where he intentionally killed six women, but under a mental state of such reduced culpability. The fact appellant intentionally killed multiple women supports the inference that most of his killings were not accompanied by a sudden heat of passion or unreasonable belief in the need to kill for defense. In turn, if most of the killings were malicious, the strong inference is that all of them were, rather than that something exceptional occurred in the one or two instances in

which a less culpable mental state was abstractly possible (but hardly probable).

3. Appellant Murdered Sheila, Yolanda, Maria, And Sharon With Premeditated Deliberation

It is reasonably clear what basis the jurors had for satisfying any reasonable doubts they might otherwise have had as to whether appellant premeditated and deliberated before he intentionally killed Sheila, Yolanda, Maria, and Sharon – each of those four women had been bound when killed.

The bodies of Sheila, Maria, and Sharon were found bound, and the bindings held the victim in a fetal position. (30 RT 14554, 14556, 14558; 32 RT 15093-94 [Sheila]; 24 RT 12732; 26 RT 13339-40, 13343 [Maria]; 34 RT 15542, 15545, 15547 [Sharon].) Yolanda's body was not bound when law enforcement saw it, but there was a fair basis for the jurors to infer the body was bound previously, given the position of the body and the ligature marks on the body. (See 19 RT 11043, 11053, 11168-72, 11217; 1 Exh-ACT 119-20 [Peo.'s Exh. 19], 123-24 [Peo.'s Exh. 21].)

There is simply no reason to bind a body which is already dead. The jurors reasonably could infer that Sheila, Yolanda, Maria, and Sharon were bound and helpless when appellant intentionally stopped the air from flowing into their bodies, and when appellant intentionally maintained that stoppage until each woman died.

It was also reasonably inferrable *why* appellant elected to kill Sheila, Yolanda, Maria, and Sharon – they could not be left alive as potential witnesses against him. Appellant enjoyed victimizing women, and particularly prostitutes. Appellant regarded them as bitches, whores, tramps, and sluts (34 RT 15702-03) to be sexually abused, preferably by brutal sodomy (34 RT 15703-04). However, as demonstrated by his attacks on Melissa

(33 RT 15294-95), Sherry (32 RT 15225-26),[43] and LaTonya (32 RT 15132-33, 15173), appellant first had to subdue the women, either by use of a threatening knife or a disabling ligature. The jurors could find themselves without any reasonable doubt that appellant used the same method – i.e., pre-emptive disablement – as to Sheila, Yolanda, Maria, and Sharon, given that all four of them were alive when appellant disabled them by bindings.

It was also clear that appellant's motive for the disablement was to facilitate some form of involuntary sexual offense or offenses. Forcible sexual offenses motivated appellant when he attacked Melissa with a knife, as demonstrated by the fact appellant engaged in those offenses – rather than killing her – once he had Melissa under his power. (33 RT 15297-15302.) Forcible sexual offenses motivated appellant in his attack on Sherry, as demonstrated by the fact he engaged in sexual intercourse with Sherry once she gave in. (32 RT 15229-32.) And, appellant demonstrated his sexual motivation with LaTonya, when he told her he wanted her to "cooperate" with him so he would not have to kill her. (32 RT 15135-36.)[44] The jurors could find themselves without any reasonable doubt that appellant had attacked Sheila, Yolanda, Maria, and Sharon for sexual purposes, and that he engaged in sexually assaultive behavior once each of them once they were disabled.

There is little reason to doubt why appellant would choose to kill Sheila, Yolanda, Maria, and Sharon. Each of them was a potential witness against him,

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43. A rational juror could observe that, while Sherry did go to appellant's home for a "date," appellant knew to expect resistance, because in fact appellant did not have the $50 which he had promised to Sherry in order to deceive her into accompanying him into his home. (See 32 RT 15213-14, 15236-37.)

44. The jurors were not given the option of convicting appellant of felony assault against LaTonya if they were not certain that his intention was to engage in an enumerated sex offense. (35 RT 15955-54, 15961-62.)

and that is as ordinary and well-understood a motive for killing as one might expect. Indeed, given that they were already helpless by reason of the fact they were bound, *nothing* would be accomplished by killing them other than elimination of them as witnesses. Given the existence of that motive, a rational juror could conclude that appellant acted with premeditated deliberation when he killed Sheila, Yolanda, Maria, and Sharon. (See *People v. Hughes* (2002) 27 Cal.4th 287, 371.)[45/]

Finally, although it was unnecessary, the jury could have inferred premeditated deliberation from the fact appellant chose, as his method of killing, asphyxiation. Killing by asphyxiation does not occur quickly, but (as the medical testimony revealed) it can be ideal as a method when one does not want the cause of death to be readily attested to by a medical professional. And, the jurors reasonably could infer that the *time* required for killing by such a method makes it difficult *not* to engage in premeditated deliberation.

Even one whose act of asphyxiation commences upon bare impulse will immediately be faced with the violent struggles of his victim; such violent struggles would tend fairly strongly to impress upon the killer that his rash impulse has created a dilemma. On one hand, the would-be killer can desist in the acts which followed from the impulse. However, a die has been cast already – an attempt to kill has been made; if the killer stops, he will still face the prospect of prison, for the victim will surely report the attack. On the other hand, the killer can continue killing his victim, brushing aside the victim's struggles (or ignoring them if the victim is already bound and helpless). This will ensure the victim's inability to report the matter, and the killer's prospects of escaping imprisonment will greatly increase. A juror reasonably could infer

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45. But see *People v. Edwards* (1991) 54 Cal.3d 787, 814 ("We have never required the prosecution to prove a specific motive before affirming a judgment, even one of first degree murder. A senseless, random, but premeditated, killing supports a verdict of first degree murder.").

it would be difficult for appellant to avoid such thoughts, and such a pattern of thought readily satisfies the criteria of premeditated deliberation.[46/]

As a final note, respondent declines to engage the standard defense contention that under the framework of *People v. Anderson* (1968) 70 Cal.2d 15, a sufficient case for premeditated deliberation presumptively should include proof of planning, motive, and/or manner of killing. "'*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.' " (*People v. Sanchez*, *supra*, 12 Cal.4th at p. 33, citation omitted.) More importantly, *Anderson* really provided nothing more than a " 'synthesis of prior case law' " in 1968 (*People v. Mayfield, supra*, 14 Cal.4th 668, 768), and the effect of the 1981 amendment to section 189 (cf. *People v. Smithey, supra*, 20 Cal.4th 936, 979, citing *People v. Swain* (1996) 12 Cal.4th 593, 616) certainly was not encompassed in that case law. Unsurprisingly, this Court has since found (although without express reliance on the amendment) that the so-called "*Anderson* factors" really are not "well adapted" to a role of setting forth a test for whether a jury could rationally infer premeditated deliberation. (*People v. Mayfield*, *supra*, at p. 768.) Thus, insofar as the "*Anderson* factors" appeared in the trial evidence, well and good; however, there will be no additional response directed in response to invocation of *Anderson*.

Appellant's evidentiary challenge lacks merit.

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46. Appellant suggests the opinion in *People v. Bradford* (1997) 15 Cal.4th 1229, 1345, *forbids* a jury from inferring premeditated deliberation from the fact a killer elects to kill by asphyxiation. (AOB 141-142, 150, 154.) However, the citation reflects only this Court's recognition that the inference is not compulsory on a jury. Appellant's assertion merits no additional response.

II.

APPELLANT'S CHALLENGE TO THE PROSECUTOR'S ARGUMENT ON PREMEDITATED DELIBERATION MUST BE DENIED

Under the guise of a claim of "prosecutorial misconduct," appellant asserts that a few words in the prosecutor's several-hundred-page initial argument denied him some constitutional right or rights. Appellant floats six different ways his argument "can be characterized" – all without elaboration, but the basic premise is that the jurors likely were misled to the point that they found him guilty of first degree murder without making the factual findings necessary for premeditated deliberation. (AOB 162-174.) However, the jury charge was adequate to ensure the jurors made the necessary factual findings, appellant has abandoned any right which he belatedly now asserts could have been infringed by the prosecutor's argument, and in any event the challenged part of the argument was proper.

A. The Proper Scope Of The Inquiry Is Limited To Examination Of Substantial Rights Of The Parties

Appellant seeks to present this Court with an issue of "error," as though it were separate from the inquiry whether there was an infringement on a substantial right – an inquiry which necessarily calls into question whether the right was abandoned at any point. (See AOB 162-167.) However, this Court's appellate inquiry does not really concern the question of "error." Rather, the beginning and ending of this Court's inquiry is whether the parties' substantial rights were prejudicially infringed. (§§ 1258, 1259, 1404.) Here, therefore, the questions for this Court are (1) what substantial right did appellant have, (2) was the right abandoned at any point, and (3) if not abandoned, was the right infringed in some way fatal to the validity of the judgment of conviction.

For the purposes of this discussion, it will be accepted without dispute

that at the outset appellant had a "substantial right" not to be convicted of first degree murder unless the jurors found factually true that he acted with premeditated deliberation when he killed Sheila, Yolanda, Maria, and Sharon. Because it is the necessary and "almost invariable assumption of the law that jurors follow their instructions" (*Richardson v. Marsh* (1987) 481 U.S. 200, 206), it is helpful to begin by examining what language was included in the jury charge. It appears the following excerpts from the trial judge's instruction are relevant:

> . . . I allow the attorneys to comment on the instructions during their arguments. Obviously, you take the law from me. But the attorneys may want to tie in the law along with the facts in their arguments to you. . . .

(35 RT 15929);

> . . . you must apply the law, that I state to you, to the facts as you determine them, . . .

(35 RT 15929-30);

> If any thing concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

(35 RT 15930);

> . . . Consider the instructions as a whole and each in light of all the others.

(35 RT 15936);

> All murder, which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought, is murder of the first degree.
> [¶] . . . [¶]
> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed . . . course of action. . . .

> The word "premeditated" means considered beforehand.
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder in the first degree.
> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

(35 RT 15951-52).

Appellant offers no argument which purports to explain how a jury which followed these instructions, and made the factual findings specifically set forth and elaborated no less than three different ways therein, would have failed to make the factual findings necessary for premeditated deliberation. (See AOB 162-171.) Because it is presumed the jurors in fact followed these instructions (*Richardson v. Marsh, supra*, 481 U.S. at p. 206), there seems no reasonable argument for the proposition that appellant was denied his substantial right to have the jurors find premeditated deliberation only after making the necessary factual findings.

Nonetheless, appellant offers argument, which is addressed below.

B. Effect Of Appellant's Lack Of Objection

Appellant recognizes that his "prosecutorial misconduct" argument comes too late, but he argues he has a right to make the argument belatedly and/or at least this Court has a right to consider his argument and reverse based on the argument despite any lateness. (AOB 172-174.) Appellant is mistaken.

1. California Law Requires Denial Of The Claim Given The Lack Of Objection

The California Constitution makes this Court the body to review directly such matters as may in fact be reviewable in a capital case (Cal. Const., art. VI, § 11(a).) However, the question of *which* matters *are* reviewable on appeal from a criminal judgment is for the Legislature, which is empowered to limit such matters. (*People v. Mazurette* (2001) 24 Cal.4th 789, 792 [" 'It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute.' "]; *Trede v. Superior Court of City and County of San Francisco* (1943) 21 Cal.2d 630, 634 ["There is no constitutional right to an appeal; the appellate procedure is entirely statutory and subject to complete legislative control."]; *People v. Callahan* (1997) 54 Cal.App.4th 1419, 1422 ["The Legislature has the power to change the procedure, limit the right, or even abolish the right to appeal altogether. [Citation.]"].)

The Legislature has exercised that power. With an enumerated exception,[47] on direct appeal a court's power to "review any question of law involved in any . . . thing whatsoever said or done at the trial or prior to or after judgment" is conditioned upon whether such "thing was said or done after

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47. This exception being "any instruction given, refused, or modified." (§ 1259.) That failing in this exception, in light of the People's right to due process of law (Cal. Const., art. I, § 29), is the subject of later discussion. (Arg. V.A.1, *post.*)

objection made in and considered by the lower court, . . ." (§ 1259, emphasis added.)

Appellant made no objection, at trial, to the oral argument which he now calls "prosecutorial misconduct." Section 1259 admits to no exception for "prosecutorial misconduct," and the Legislature has not granted to this Court the power to make exceptions to the statute. It follows that the statutory authority granted to this Court to review "things" said or done below does not and cannot extend to review of the argument made by the prosecutor under the guise of examining whether there was "prosecutorial misconduct."[48/]

2. Appellant Abandoned Any Federal Constitutional Guarantee Which Was Inconsistent With The Prosecutor's Conduct When, With Full Awareness Of The Conduct, He Consented To Proceed To Verdict Without Objection Or Request For Admonition

This Court must enforce the Legislature's statutory limitation unless that limitation is clearly, positively, and unmistakably unconstitutional. (*People v. Falsetta* (1999) 21 Cal.4th 903, 912-913.) Such unconstitutionality does not clearly, positively, and unmistakably appear. To the contrary, this rule merely gives effect to a settled principle that even constitutional protections are forfeitable.

The United States Supreme Court has recognized that a protection

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48. Citing *People v. Vera* (1997) 15 Cal.4th 269, 279, appellant mistakenly suggests that this Court therein held, " '[O]bjection in the trial court is not required to preserve a federal constitutional issue.' " (See AOB 172.) Examination of the opinion in *Vera* reveals that the quoted passage was part of this Court's description of the lower court's logic, and not in any way a holding by this Court. To the contrary, this Court has often rejected the oft-repeated assertion by defendants that the mere invocation of the federal constitution will permit a point to be raised belatedly. (See *People v. Holloway* (2004) 33 Cal.4th 96, 129; *People v. Brown* (2003) 31 Cal.4th 518, 546; *People v. Sapp* (2003) 31 Cal.4th 240, 275; *People v. Carter* (2003) 30 Cal.4th 1166, 1207.)

guaranteed by the United States Constitution generally is abandoned when a properly-counseled litigant fails to invoke that protection before a court authorized to resolve any threatened infringement of that guarantee. (See *United States v. Gagnon* (1985) 470 U.S. 522, 527-529.) Once competent counsel has been appointed, due process considerations generally do not require a trial judge sua sponte to take action which only belatedly will be argued to have infringed upon some protection guaranteed by the United States Constitution. Rather, fairness appears at the fundamental level so long as *counsel* is free to object if, in counsel's judgment, corrective action is needed. (See *Estelle v. Williams* (1976) 425 U.S. 501, 507 ["the particular evil proscribed is *compelling* a defendant, *against his will*, to be tried in [the challenged manner]" (emphasis added)], 512-513 ["the failure to make an objection to the court . . . , for *whatever* reason, is sufficient to negate the presence of *compulsion* necessary to establish a constitutional violation" (emphasis added)] & fn. 9].)

This core fact cannot be brushed aside based on some amorphous ground that there is some greater inherent interest of the criminal justice system. "In general, '[i]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation.' [Citation.]" (*New York v. Hill* (2000) 528 U.S. 110, 117.) The United States Constitution does not permit courts to "rewrite the duties of trial judges and counsel in our legal system" under the guise that the system at large has an interest in maintaining a protection for a criminal defendant when the defendant's representative competently decides to waive that protection by lack of objection. (*Estelle v. Williams, supra*, 425 U.S. at p. 512.)

> . . . the lawyer has – must have – full authority to manage the conduct of the trial." [Citation.] As to many decisions pertaining to the conduct of the trial, the defendant is "deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " [Citation.] Thus, decisions by counsel are

> generally given effect as to what arguments to pursue, [citation], . . . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.

(*New York v. Hill, supra*, 528 U.S. at p. 115; see also *United States ex rel. Allum v. Twomey* (7th Cir. 1973) 484 F.2d 740, 744-745 ["assuming the lawyer's competence, the client must accept the consequences of his trial strategy"].)

Further, it is important to note the United States Supreme Court's holdings on this point do not require endorsement of a syllogism that (1) a criminal defendant has a continuing right, (2) something has occurred which violated that continuing right, and (3) nonetheless, the defendant for technical reasons will not be allowed to assert that continuing right. To the contrary, that Court has recognized the core principle that the protections set forth in the United States Constitution are no longer guaranteed when, despite awareness of the facts amounting to threatened infringement of that protection, the defendant declines to object and invoke that protection.

Stated more plainly, from the federal constitutional perspective, it is not so much a question of a procedural right to raise an appellate *claim* to vindicate some infringed protection. Rather, the United States Supreme Court does not blink at recognition of the *substantive* point that, upon the failure to object to infringement of a constitutional protection, such protection to that same extent ceases to exist, and therefore there is nothing to vindicate in a later "claim."

To elaborate, the Court has stated, "The most basic rights of criminal defendants are . . . subject to waiver." (*Peretz v. United States* (1991) 501 U.S. 923, 926 ("*Peretz*"); accord *United States v. Mezzanatto* (1995) 513 U.S. 196, 201.) Further, in federal constitutional parlance, "waiver" does *not* imply a searching and solicitous inquiry so as to make *certain* the defendant really and truly understands, and yet declines to invoke, a given constitutional guarantee. To the contrary, a simple "absence of objection" or "failure to object" will

suffice as abandonment of constitutional protections. (*Peretz, supra*, at pp. 936-937; *United States v. Gagnon, supra*, 470 U.S. 522, 527-529; *Estelle v. Williams, supra*, 425 U.S. at p. 508.)

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

(*Yakus v. United States* (1944) 321 U.S. 414, 444 ("*Yakus*"); *United States v. Olano* (1993) 507 U.S. 725, 731 ("*Olano*") [same].)

And, the United States Supreme Court has recognized that there is no *constitutional* requirement of a safety valve in the form of judicial discretion to review appellate claims notwithstanding forfeiture. (*Yakus, supra*, 321 U.S. 414, 444-445 ["While this Court in its discretion sometimes departs from this [forfeiture] rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, [citation], and it could hardly be maintained that it is beyond legislative power to make the rule *inflexible in all cases*." (emphasis added)].)[49/]

3. Appellant's Challenge Of "Prosecutorial Misconduct" Must Be Denied

Here, then, it has been acknowledged that appellant began the trial with a right not to be convicted of first degree murder (despite any and all substantial

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49. All the same, the United States Supreme Court's holdings suggest two inherent exceptions to this principle, both involving structural rights. Because the tribunal must be one "having jurisdiction to determine" the right (*Yakus, supra*, 321 U.S. 414, 444), an objection may be unnecessary to ensure a judicial officer presides over the proceedings. (*Peretz, supra*, 501 U.S. at p. 937.) Further, because appointment of counsel likely is required if the opportunity for a "timely assertion of the right" (*Yakus, supra*, at p. 444) is to be meaningful, it is hard to see that the "unique constitutional" and "jurisdictional defect" of failure to appoint counsel (*Custis v. United States* (1994) 511 U.S. 485, 496 ("*Custis*")) could be disregarded for lack of objection.

evidence of his guilt) unless the jurors made the factual findings necessary to establish premeditated deliberation. Appellant's theory is that the statements by the prosecutor during oral argument were inconsistent with that right – that the wrongful message and power in that argument were so great as to likely prevent the jurors from making the factual findings necessary for premeditated deliberation. (AOB 163-171.)

However, the Legislature has restrained this Court from reviewing that theory, because there was no objection to the argument below, and there is no constitutional defect in that legislative limitation. Worse, the consistent holdings of the United States Supreme Court compel the conclusion that appellant abandoned so much of his jury trial right as was infringed by the prosecutor's argument, given that appellant elected through competent counsel to proceed to verdict with that jury without so much as a request for admonition, much less a request for a new jury (i.e., a mistrial).

Accordingly, appellant's challenge must be denied.[50/]

C. Appellant's Mistaken View Of The Likely Effect Of The Prosecutor's Argument

In any event, appellant's argument is unrealistic. Even a juror's most cursory examination of the prosecutor's statements would not lead to the

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50. In light of the statutory bar to review, it is unnecessary to rely directly on the People's right to due process of law, as to which there is full elaboration later in this brief. (See Arg. V.A.1, *post.*) However, that right, too, would preclude reversal, given that counsel for appellant declined to object to the argument, and appellant's assertion that the argument provided a basis for objection is hardly the same as an argument that every competent attorney would have felt compelled to make the objection. (See *People v. Maury* (2003) 30 Cal.4th 342, 419 ["Regarding some of the alleged instances of prosecutorial misconduct, defendant claims defense counsel were ineffective for not objecting. However, deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance. [Citations.] As we explain, this is not one of those rare cases."].)

constructions urged by appellant.

1. The Likely Effect Of The Prosecutor's Statements

a. The "Flick of an Eye" and "What First Degree Murder Is All About"

Here is the first part of what the prosecutor said (including such statements as are omitted from appellant's brief):

> Well, Ladies and Gentlemen, let's just talk for a moment about this. Assuming these are murders and assuming these people died of some sort of asphyxial death, either someone put a pillow over their face and suffocated them, sock down their mouth, or someone took a ligature and put it around their neck and strangled them to death, you know, that doesn't occur in a flick of an eye, moment's time. Even if you have a person all hog tied up, even got their feet tied up, hands tied behind their back, maybe they can struggle, maybe make a few guttural sounds, takes awhile for them to die, doesn't it? Isn't that what first degree murder is all about?

(36 RT 16295.)

Indeed. As can be seen, and contrary to appellant's assertion, no reasonable person could hear this argument and conclude the message was that as a matter of law premeditated deliberation is present whenever a killing takes more than an instant. (See AOB 162.) Rather, the clear message – and a correct one – is that as a matter of fact one may infer appellant's premeditated deliberation when one considers the continued effort he had to make to inflict death by the relatively lengthy process of deprivation of oxygen from a body. That process will trigger violent struggles, and perhaps "a few guttural sounds" which would impress upon appellant that the woman in question was fighting for her life – and despite this knowledge appellant continued to suffocate or strangle the person or jam the sock in.

Thus, when appellant killed Sheila, it was likely that she struggled and fought to hold onto life. Yet appellant persisted in his murderous efforts instead

of relenting in the face of such struggle.

When appellant killed Yolanda, she likely made a guttural sound or two. This likely would impress upon appellant that his desire to avoid later incrimination meant that another human would endure a painful passage from existence.

Killing Maria, as she worked against the bonds holding her in a fetal position with her hands of no use because they were bound together behind her knees, it would be difficult indeed – during the many seconds it would take for her to slip into unconsciousness before death – for appellant to avoid appreciation that another woman was dying, by his own hand. Reason enough to stop, yet appellant continued to kill Maria, so that he could avoid capture and persist in his victimizations.

And, when appellant killed Sharon, she likely reacted as one would expect when the first balled-up sock was jammed into her throat, blocking the flow of oxygen; her struggles likely would have commenced immediately. Nonetheless, appellant jammed another sock into Sharon's mouth, ensuring there would be no life-giving oxygen.

Thus, the prosecutor was correct in his summary. These four murders, by asphyxiation, of four bound women – that is a fairly good example of "what first degree murder is all about." Appellant is mistaken in his view that this part of the prosecutor's statement was likely to be understood to illuminate an unlawful path to a finding of premeditated deliberation.

b. "An Impression In Your Mind That You Will Never Forget"

Then, when discussing the knowledge appellant gained when he killed Linda, the prosecutor said:

> Beyond that, Ladies and Gentlemen, let's just assume that the first one was the product of some unfortunate happening. I don't know what that would be, but let's make that assumption. Let's say the first one wasn't

a first degree murder, it was a second degree murder, there was no premeditation, no deliberation, wasn't willful; it just happened. I don't know how you could do that, how you could strangle somebody without going through that. Let's make that assumption.

If the first one was only a second degree murder, what do you think happens to this next time you do it? Does it become a first degree murder the third time, the fourth time, the seventh time? Don't you think at some point you draw upon that memory bank when you picture in your mind those bodies squirming, jerking around for whatever period of time they did before they finally stopped moving?

When you went out behind the various houses with your trusty shovel and you dug the hole, you know, even if the ground is like mush, even like where Miss Apodaca was found, dog dish running continually over, so a bunch of mud, so all you are doing, you are shoveling mud out of the hole – when they took the body out of the hole, still four or five inches of water in the bottom of that hole – that mud, even if the digging is easy, takes time to dig a two-foot hole.

If you killed somebody, you got to go out and dig that hole, then you got to wrap that body, put it in the hole, fill the hole up. Next time you go through the process, don't you think it's got – got to make some kind of impression in your mind? Don't you think so?

You know, these ladies weren't killed just for fun. I mean isn't there an overriding sexual motivation that you see throughout these crimes? Isn't there some sort of sexual motivation behind this? Maybe it's something we don't understand entirely, but whoever did this has some sort of a sexual motivation for doing what they're doing. Maybe they can't get off, to use Ledia Rose Baker's phrase, until they see someone die, having intercourse with them. I'm not saying that. I don't know. There is certainly sexual motivation to this. Half the victims are nude or semi-nude.

Don't you think, after the first one, when we get to the second one, when you have the second young lady with half or all her clothes off, and you got her tied up, trussed up like a Thanksgiving turkey, and then you strangle her to death, then you suffocate her to death, doesn't it have to go through your mind, "This is just like the one I did last month," huh? "Look at how they just kind of – they beg and plead, or whatever it is they do; then they finally move and then they stop moving, and then I dress them all up, put the covers on them, I put the mattress covers, I put the bedspread, whatever it is, then I go out and dig the hole; once I got the hole nice and ready, I carry the body out there, I cover up the hole, cover it up real quick, and I go back in the house.

I mean somewhere along the line between number one and number

> seven, got to become first degree murders. I suggest they become first degree murders with the first one. Even if you are unpersuaded with the first one, at least, by the second one, it has got to leave an impression in your mind that you will never forget.

(36 RT 16295-97.)

Again, indeed. There was simply nothing legally incorrect in the prosecutor's analysis. It would have been entirely reasonable for the jurors to find that the knowledge appellant gained when he asphyxiated Linda (see Evid. Code, § 1101(b)) would not have been forgotten when later he killed Sheila. Watching how Linda died, as she struggled and gurgled and fought against the violent taking of her life – this could be expected to leave an indelible impression on appellant. It would have been reasonable for the jurors to infer this was a reasonable explanation of why appellant first gagged Sheila when he killed her, perhaps hoping such gagging might reduce the sounds of gurgling Sheila could be expected to make when appellant asphyxiated her.

It would have been reasonable for the jurors to infer that this was why Sharon was also found gagged in her grave, and that the gag which appellant almost certainly used on Yolanda was absent for the same reasons that the bindings used on her were absent – appellant removed them after death to make her death look accidental. Further, the jurors could infer the experience of killing Linda, Sheila, and Yolanda sufficed to instill in appellant an appreciation of what to expect when he killed Maria.

Appellant is mistaken in his view that this part of the prosecutor's statement was likely to be understood to illuminate an unlawful path to a finding of premeditated deliberation.

c. The Jury Instructions

However, even were the jurors likely to glean some improper legal theory from the prosecutor's argument, that would be meaningless for appellant.

As to the first excerpt from the prosecutor's argument, appellant's argument is unhelpful because he cannot demonstrate the jurors would fail to follow the court's instruction. Even if one were to adopt appellant's tortured construction of the first part of the prosecutor's comments, then the conclusion would be that the prosecutor was arguing to the jurors that the true test of premeditated deliberation is time, rather than extent of reflection. However, the trial court had specifically instructed the jurors to the contrary – that "[t]he true test is not the duration of time, but rather the extent of the reflection." (35 RT 15952.) Further, the court instructed that this test governed irrespective of anything contrary stated by the prosecutor in any portion of his argument. (35 RT 15930.) Nothing in appellant's argument changes the fact that the jurors' adherence to these instructions would suffice to ensure the necessary factual findings were made.

It seems that appellant's true disagreement is based on his theory that premeditated deliberation must occur *prior* to formation of intent to kill, rather than developing while that intent continues to exist prior to the killing. (See AOB 163-164.) Appellant does cite to *People v. Bender* (1945) 27 Cal.2d 164, 182, which tends to suggest this Court applied such a rule prior to 1981. (AOB 164; see also *People v. Carmen* (1951) 36 Cal.2d 768, 777.)

However, the only logical reason for such a rule was that prior premeditated deliberation might be considered necessary to ensure mature and meaningful reflection regarding the gravity of the murder. But, the requirement of such reflection "has itself passed into history." (*People v. Cortez* (1998) 18 Cal.4th 1223, 1234.) Necessarily, so has passed the rule designed to ensure such reflection. (Cf. *People v. Stanley, supra*, 10 Cal.4th 764, 801 ["When the reason fails, so should the rule."], citing Civ. Code, § 3510 ["When the reason of a rule ceases, so should the rule itself."].) Appellant's implicit insistence that the law of premeditated deliberation has not changed since 1981 is unhelpful.

Finally, appellant is simply wrong to the extent he suggests there is any reasonable doubt whether the jurors followed the logical path which appellant chooses to tease[51/] from surgically-excised portions of the prosecutor's statements. Contrary to appellant's imagination (see AOB 162-163), the verdicts do not reflect any chance the jurors adopted a view that premeditated deliberation is present once a killing takes more than a blink (or flick) of an eye. Otherwise, both the murders of Linda and Cherie would have been found in the first degree. Likewise contrary to appellant's imagination, the verdicts do not reflect a view that, after some point, automatically the murders were of the first degree. Otherwise, the jurors would have found the final murder – of Cherie – to be in the first degree.

In sum, appellant's challenge must be rejected.

III.

THE STATUTORY DEFINITION OF PREMEDITATED DELIBERATION IS CONSTITUTIONAL

Appellant asserts there is no distinction between the "two degrees of intentional murder" if "premeditation and deliberation can occur in a flash *during* the act of killing and *after* intent to kill has been formed." He refers to

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51. Appellant's substantial rights do not include a right to review which assumes jurors will likely tease out of a prosecutor's argument the sort of extreme and absurd interpretation's which can only be found in the parsing by the most partisan person possible – an attorney seeking any conceivable means of finding a ground for reversal. (Cf. *Greer v. Miller* (1987) 483 U.S. 756, 765-766 [". . . When the defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important 'as an initial matter to place th[e] remar[k] in context.' "]; and cf. *Boyde v. California* (1990) 494 U.S. 370, 380-381 ["Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting."].)

"S. Mounts, '*Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*', U.S.F.L.Rev. (Winter, 2002), pp. 327-328," as support for a claim that analysis pursuant to the so-called *Anderson* factors is necessary as a matter of law to ensure the offenses are truly distinct. And, he asserts, "[I]f the article is correct," and he does not get his way in this case (i.e., his theories of premeditated deliberation are wrong), then "it is the law of this state that violates the due process clauses of the Fifth and Fourteenth Amendments and not merely the verdicts rendered in this case." (AOB 175-176.) However, the argument of a commentator is only an argument, and to the extent that argument concurs with appellant, both the commentator and appellant are simply wrong.

Two propositions are suggested by appellant's assertions, and it is not clear which is intended. Appellant cites the "due process clauses," which tends to suggest a challenge which is not specific to capital cases. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 361.) To such a challenge, a proper response would be that the Constitutions of California and the United States do not require there to be two distinct offenses of first degree murder and second degree murder, much less a subset of first degree *intentional* murder versus second degree *intentional* murder. The Legislature is entirely free to eliminate the crime of second degree intentional murder entirely and make all intentional murder the offense of murder in the first degree. Were it the case that the 1981 amendment to section 189 actually had that effect, thus essentially rendering very small or virtually nonexistent the number of murders which were both intentional and yet lacking in premeditated deliberation, that would simply amount to a policy choice that second degree murder should generally be reserved for unintentional murders, and that only rarely should an intentional murder not qualify for first degree murder punishment.

For the reasons previously stated (Arg. I & Arg. II, *ante*), the evidence

and instructions satisfied the statutory definition of first degree murder by premeditated deliberation. There is no question but that the Legislature's 1981 amendment to section 189 was meant to reduce substantially the number of intentional murders which the courts could restrict to second-degree status. If in fact the result is that virtually all intentional murders now satisfy the statutory definition of first degree murder, then that would imply the Legislature has made a policy decision to virtually eliminate the number of intentional murders which are considered only of the second degree. That does not even go so far as eliminating the crime of second degree murder (which the Legislature could do), given that murder can still be committed unintentionally.

Thus, appellant's argument does nothing to advance a claim that the verdicts must be modified on due process grounds.

The uselessness of a due process argument suggests perhaps appellant may intend a different argument, but that he simply cited the wrong constitutional provision. Given that this is a capital case, and that California restricts eligibility for the death penalty to first degree murder to the exclusion of second degree murder (§ 190), appellant may be arguing that a conviction for first degree murder is one of the cumulative means by which California acts to narrow the class of murders to a death-eligible subclass, but that such narrowing is illusory.

The Eighth Amendment[52/] requires California's death penalty scheme to ensure that only a subclass of murders is eligible for the death penalty. Further, a finding which performs the actual narrowing must "meet two requirements."

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52. "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, [] (1972)." (*Maynard v. Cartwright, supra*, 486 U.S. 356, 361.)

(*Tuilaepa v. California* (1994) 512 U.S. 967, 972 ("*Tuilaepa*".) The finding "may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." (*Ibid.*) As well, the finding "may not be unconstitutionally vague." (*Ibid.*)[53]

If this is appellant's intended argument, it fails too. Even if appellant were correct that there is an illusory distinction between first degree *intentional* murder and second degree *intentional* murder, that would be of no assistance to him. If that were true, then the necessary conclusion would be that the narrowing in California's scheme does not occur based on the distinction by degree in intentional murder. However, that would not change the fact that the California scheme accomplishes narrowing by excluding from death a great many unintentional second degree murders (§ 190), as well as any first degree murder where a special circumstance has not been found true (§ 190.2(a)). Thus, even were the distinction between first degree intentional murder and second degree intentional murder truly a distinction without an appreciable difference, there would be no constitutional defect, because that would imply merely that this distinction is not one of the narrowing means in California's capital scheme.

However, appellant is wrong to the extent he asserts the difference between first degree intentional murder and second degree intentional murder is a distinction without a difference. Tested by the *Tuilaepa* standard, it does not appear that every intentional murder could amount to murder with

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53. The resulting subclass must be genuinely narrow*ed* – i.e., reduced – from the class of murders (*Arave v. Creech* (1993) 507 U.S. 463, 474 ("*Creech*")), but that does not imply the resulting subclass must itself be "narrow" – i.e., small in size (*id.* at p. 475 [upholding scheme in which the resulting subclass was "defined broadly" to include the "broad" class of murders classifiable as first degree, such that "a sizable class of even those murderers who kill with some provocation or without specific intent may receive the death penalty under Idaho law"]).

premeditated deliberation, or that the definition of premeditation is "unconstitutionally vague," i.e., that it " 'is itself too vague to provide any guidance' " to a jury seeking to determine whether it is present. (*Tuilaepa, supra*, 512 U.S. 967, 972, citation omitted.) As the jurors were informed, the test for premeditated deliberation is this:

> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed . . . course of action. . . .
> The word "premeditated" means considered beforehand.
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder in the first degree.
> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

(35 RT 15951-52.)

Thus, included in second degree intentional murder, but excluded from first degree intentional murder, are at least the following: (1) Any intentional murder in which the intent to kill did *not* include "careful thought and weighing of considerations for and against the proposed . . . course of action," e.g., a murder committed "under a sudden heat of passion or other condition

precluding the idea of deliberation, . . ."; and (2) Any intentional murder which results from a "mere unconsidered and rash impulse," as opposed to "cold, calculated judgment," i.e., a murder in which the murderer kills only after he has "weigh[ed] and consider[ed] the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill."

A defendant certainly can reach a final, calculated decision to kill – even if that is preceded by a preliminary, unconsidered, and impulsive intent to kill. If, after such calculation, the defendant elects to continue his murderous action and he ends the victim's life, it is not difficult to discern that there is an actual difference between that defendant and one who only killed on unconsidered impulse. There may well be occasions during which jurors will have difficulty determining *whether* it has been proven that the defendant engaged in that calculation, but that is hardly the same as saying there is no appreciable distinction when that calculation has in fact been proven.[54/]

Thus, the statutory requirement of premeditated deliberation in fact provides a basis for actual narrowing of the class of even intentional murders, and in terms that provide actual guidance to a jury seeking to determine whether the elements of premeditated deliberation are present. If this was appellant's intended argument, it fails too.

In sum, whatever theory appellant intended to assert as to why the actual definition of premeditated deliberation is unconstitutional, appellant is mistaken.

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54. "The law has long recognized that a defendant's state of mind is not a 'subjective' matter, but a *fact* to be inferred from the surrounding circumstances. [] ' "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove . . . , but if it can be discerned it is as much a fact as anything else" ' []." (*Creech, supra*, 507 U.S. 463, 473, original emphasis, citations omitted.)

IV.

APPELLANT'S CHALLENGE TO ADMISSION OF HIS STATEMENTS MUST BE DENIED

Appellant challenges the admission of certain statements he made to police, alleging for the first time that such admission was the product of "prosecutorial misconduct." Appellant asserts the statements suggested, in a misleading and prejudicial way, that he admitted strangling a women to death. (AOB 177-185.) This challenge must be denied.

A. The Admission Of The Evidence Is Unreviewable

While there is no question that certain statements by appellant were admitted into evidence (see 30 ACT 8821 - 31 ACT 9147 [transcripts (not admitted) of tape-recorded interviews (admitted)]), it is just as clear that appellant did not object to such admission. That forecloses any claim based on admission of the evidence. Appellate counsel has no knowledge superior to that of trial counsel – who heard every word just as did the jurors during trial. Trial counsel thus had every opportunity to object and counsel elected not to object, move to strike, or seek admonition or mistrial. For the reasons previously stated (see Arg. II.B, *ante*), the admission of the evidence is flatly unreviewable, irrespective of how appellant seeks to characterize the fact of the admission (§ 1259),[55] and likewise appellant, by not objecting, abandoned any protection which he imagines was inconsistent with the admission of that evidence (*Peretz, supra*, 501 U.S. 923, 936-937; *United States v. Gagnon,*

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55. The admission of the evidence is also unreviewable because Evidence Code section 353 sets forth a separate and specific bar to consideration of the claim, given that appellant did not make clear any such objection to the evidence, even in the form of a motion to strike, at trial. (See Evid. Code, § 353.) Also, although it is again not necessary directly to rely on the People's right to due process of law, that right also precludes reversal here. (See Arg. V.A.1, *post.*)

supra, 470 U.S. 522, 527-529; *Yakus, supra*, 321 U.S. 414, 444).

B. Were The Admission Of The Evidence Reviewable, There Could Still Be No Relief

Blaming the prosecutor, appellant asserts the admission of his statements could reasonably have led jurors to infer he admitted he once "strangled" a woman at some time and in some place unknown to them. Further assuming that jurors would infer " 'strangle' means strangle to *death*," appellant appears to assert the jurors were informed falsely that appellant admitted a prior murder. (AOB 180-183, original emphasis.) However, appellant fails to demonstrate the evidence was reasonably likely to mislead the jurors, and therefore he cannot demonstrate he had any substantial right to exclusion of any part of the evidence. In particular, appellant fails to demonstrate a basis for the jurors to infer either that he admitted ever strangling anyone, or that he would have meant "strangle" to mean "strangle to death."

The jurors heard a tape recording of appellant's April 22, 1987 arrest in the field and his discussion with police officers immediately thereafter while en route to the police station. (See 20 ACT 8981-82.) The following post-*Miranda*[56] (see 30 ACT 8982-83) statements, among others, were included:

> Q [Officer]: . . . And what I'd like you to do, I explai[ne]d to you earlier, you know, be up front with me and I'm going to be up front with you and you said that's fine.
> A [appellant]: And I still say that.
> Q: Okay, and I'm up front with ya and I would like to know what happened. [¶] How many peo[p]le have you murdered?
> A: None, none N-O-N-E, sir.
> Q: How many whores have you strangled?
> A: None.

(30 ACT 8983-84.)

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56. *Miranda v. Arizona* (1966) 384 U.S. 436.

From this evidence, no juror could doubt appellant denied ever strangling any prostitute.

After arrival at the police station, discussion continued. (30 ACT 8989-90.) Well into the discussion, the subject of strangling resumed after the detective reacted to appellant's belated clarifications during questioning:

> Q: Okay. But you have talked shit like that?
> A: Right.
> Q: Okay.
> A: I mean you didn't ask, do I talk shit, you ask have I sodomized anybody? I haven't.
> Q: I think this is kind of like what we got in with this sprinkler deal. Me asking you did you repair the sprinkler. I think this is where we're getting on this one here too.
> A: Right, but, I talk crazy to any woman. I don't want you puss baby, let me – let me get the ass at you. [¶] Okay. I'm with you, you say that.
> Q: [Transcript says "Deep breath"] Never strangled girls. [¶] Are you sure?
> A: Nothing that I can remember.
> Q: Okay.
> A: *I know you're going to have some girls say I did so*, uh I mean –

(31 ACT 9127, emphasis added.)

From this exchange, the jurors were also informed unequivocally how appellant interpreted the verb "strangle." It was difficult to miss the fact appellant referred to strangling as a non-fatal activity. In his statement (italicized above), appellant expected that the police would have already heard from more than one female alleged victim ("some girls" – plural) who necessarily would be *alive* to attest that he strangled them. In other words, the only realistic reading of appellant's statement was that when he referred to strangling, he meant *non-fatal* strangulation.

These were the precursors to the statements later made by appellant. The officer asked appellant how he would view the evidence "if you're in my position and had all this here, . . ." (31 ACT 9130.) This led to the following:

Q: Okay, all right. So I can *assume* then – assume *because I have these people saying that* – that you lied there, I can assume that.
A: Okay. *I mean you can assume.*
Q: Yeah, *I'm assuming this.* Never strangled girls. And I have the one here, so I can say you lied. Right?
A: Okay.

(31 ACT 9130-31, emphasis added.)

The jurors, who had the benefit of the actual tape recording rather than merely the inflection-bereft transcript, would have had no difficulty recognizing appellant was admitting to nothing (not even non-fatal strangulation). In the exchange, the officer explained he would "assume" appellant was lying for the simple reason that witness statements were contrary to appellant's statements. Appellant responded using the word "Okay" – but appellant specifically clarified that, by his use of the word, he meant nothing more than to signal his understanding that they were speaking of what assumptions an officer would make. In rejoinder, the officer specifically re-affirmed this understanding. There is no reasonable argument that, in light of all the admitted evidence, the jurors could have inferred a confession to a prior murder.[57]

It is perhaps for this reason that appellant attempts to have this Court consider evidence which was not admitted. (See AOB 178, 180.) But, evidence which was not admitted necessarily played no part in what inferences

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57. As for the reference to "the one here," appellant is mistaken in his assertion that jurors would infer they were hearing an allusion to extrajudicial evidence. To the contrary, the jurors knew that, at the time of the April 22, 1987 interview, the police were so far advised of "one" strangling. On the very day of the interview, LaTonya had related to officers that appellant had non-fatally strangled her. (32 RT 15144, 15164.) No rational juror would have had reason to speculate that "the one here" referred to anything other than LaTonya's report of strangling. (The officers did not yet know of "two" stranglings -- rather than "the one here" – because Sherry would not report her encounter with appellant until she later saw appellant's picture in the newspaper (33 RT 15260).)

the jurors might have drawn from the evidence which was admitted, and thus no further discussion is necessary to reach the conclusion that, for all the reasons herein stated, appellant's challenge must be denied.

V.

APPELLANT'S CHALLENGE AS TO NOTES AND READBACKS MUST BE DENIED

The instruction to the jurors included the following:

> . . . Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others.
>
> . . .
>
> The People and the defendant are entitled to the individual opinion of each juror.
>
> Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and the instructions with your fellow jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.
>
> . . .
>
> The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of the deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown that it is wrong. . . .
>
> You were allowed to take notes, and you may use your notes during your deliberations. Keep in mind, however, that notes are only an aid to memory and should not take precedence over independent recollection. A juror who did not take notes should rely on his or her independent recollection of the evidence and not be influenced by the fact that other jurors did take notes. Notes are for the notetaker's own personal use in refreshing his or her recollection of the evidence.
>
> Finally, should any discrepancy exist between a juror's recollection of the evidence and his or her notes, he or she may request that the court reporter read back the relevant proceedings and the trial transcript must

prevail over the notes.

(35 RT 15936-38);

> If you have a serious question as to what the evidence is, you can always request the court reporter to read back any portion of the testimony. As I have told you, we have daily transcripts of all of the testimony, so it's not going to be any serious problem for us to read back any testimony that you may need during the course of your deliberations.

(35 RT 15973).

Appellant now argues part of the language was fundamentally unfair to him in that (1) it was irrational and contrary to section 1137 to disallow one juror to consider the notes of another, (2) such disallowance would reasonably prompt a juror to disregard all statements by another, and (3) it was contrary to section 1138 to cause the jurors to conclude they could not freely seek a readback of testimony if one or more jurors remembered the testimony differently. Finally, he asserts prejudice is demonstrated by the length of deliberations. (AOB 186-198.) The challenge must be denied.

A. For Lack Of Objection, The Judgment May Not Be Reversed Based On The Jury Charge, And The Lack Of Objection Abandoned Any Constitutional Protection

Appellant does not even suggest he raised any of these objections at trial. The lack of objection requires denial of the challenge.

Unlike other issues, appellate review of this issue is not precluded by statute, as section 1259 facially does not itself make a trial-level objection a condition to appellate review of "any instruction given, refused or modified, ..." However, for the reasons which follow, it would be fundamentally unfair to the People to reverse a judgment based upon an instruction which a criminal defendant's competent counsel had adequate opportunity to review (and presumptively did review) but chose not to object

to. Such a practice amounts to extravagant protection to a defendant, particularly because it is unnecessary in that a defendant may prosecute a claim of ineffectiveness of counsel if in fact the lack of objection was a prejudicial and unprofessional error. In a case where counsel is not prejudicially ineffective for failure to object to an instruction, there can be no miscarriage of justice resulting from the fact the instruction was given. Accordingly, when the standard of ineffectiveness of counsel cannot be met, the hardship which a reversal places upon the People, based upon an instruction to which the defendant consented, has no adequate justification and is forbidden by the People's right to due process of law.

1. The People's Right To Due Process Of Law Precludes Reversal

In a few brief words, the California Constitution states, "In a criminal case, the people of the State of California have the right to due process of law . . . ." (Cal. Const., art. I, § 29.) While "due process" may be a term that is at times amorphous, if it is to have any meaning it must at least forbid that which is fundamentally *unfair*. (*People v. Marshall* (1990) 50 Cal.3d 907, 925 ["We accept . . . [the] major premise, i.e., due process demands whatever is necessary for fundamental fairness."]; accord, *People v. Barragan* (2004) 32 Cal.4th 236, 245 [noting "due process right to fundamental fairness"]; *Rogers v. Tennessee* (2001) 532 U.S. 451, 462 ["the due process concern [is] with fundamental fairness"]; *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790 ["fundamental fairness [is] the touchstone of due process"].) For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." [Citation.] Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty.

Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. (*Lassiter v. Department of Social Services of Durham County, N. C.* (1981) 452 U.S. 18, 24-25.)

There are precious few precedents construing this due process provision of the California Constitution, and it appears almost none of them actually address the question presented here. (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 892-901; *People v. Cummings* (1993) 4 Cal.4th 1233, 1298; *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 456, fn. 18; *Maniscalco v. Superior Court* (1991) 234 Cal.App.3d 846, 848-849.)[58]

This Court has, however, given some consideration to the right. In *People v. Ault* (2004) 33 Cal.4th 1250, a defendant sought to vindicate his right to an unbiased jury after the jurors had become aware of external information. Defendant Ault necessarily had no way of objecting contemporaneously to the misconduct, which happened during deliberations. (See *id.*, at pp. 1257-1258.) Ault did, however, move for a new trial before the trial judge, which motion was granted. (*Id.*, at p. 1257.)

A question before this Court in *Ault* was whether the People's right to due process of law required an independent review of the legal question which had been timely raised and resolved by a lower judicial officer; this Court's answer was in the negative. In reaching that conclusion, this Court acknowledged that the People do have "fundamental rights," and that the

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58. Further, it appears there is little or nothing to be gleaned from the examination of the arguments presented to the electorate regarding the initiative which enacted the right. (See *Miller v. Superior Court, supra*, 21 Cal.4th at p. 896, fn. 3 ["The only portion of the ballot argument in favor of Proposition 115 that commented even obliquely on article I, section 29, focused on the "speedy . . . trial" portion of that section. . . . Nowhere is there mention of the right to due process, ..."].)

"interest in preserving fair, convictions" is "significant." (*People v. Ault, supra*, 33 Cal.4th at p. 1269.) However, this Court in *Ault* made reference to a prior decision which resolved (in the negative) the narrow question whether (a) the People's state constitutional right could overcome another absolute and harmonizable right conferred in the same document, when (b) a criminal defendant's *federal* constitutional right could do so. (*Id.*, 33 Cal.4th at p. 1269, citing *Miller v. Superior Court, supra*, 21 Cal.4th at p. 896.) Ultimately, this Court stated,

> . . . the People fail to persuade us that they have a due process right – equivalent to the defendant's right to be free of conviction by a biased jury – to avoid *retrying* criminal charges before a new jury unless an appellate court comes to an independent conclusion that the trial court's determination of prejudice from juror misconduct was correct. We therefore conclude that article I, section 29 of the California Constitution affords the People no due process right to independent review of a trial court order granting a new trial on that ground.

(*People v. Ault, supra*, 33 Cal.4th at pp. 1269-1270, original emphasis.)

This statement, however, does not address the circumstances here. Defendant Ault was taken by surprise postverdict by information suggesting an infringement of his rights, and he objected thereto promptly by motion for a new trial. Appellant, in contrast, was fully aware of the text of all instructions and even heard them read, and he freely consented to having the jury consider those instructions when reaching a verdict.

There is no legitimate basis for a conclusion that appellant retained some constitutional protection against such instructions despite that consent. Rather, the question of what is fundamentally fair to a defendant in a criminal trial is intrinsically bound up in the question of what did the defendant *consent* to in that trial.

a. Even In The Context Of Jury Instructions, A Criminal Defendant's Federal Constitutional Rights Are Forfeited By Lack Of Objection

No one would reasonably dispute the crucial importance of the presumption of the defendant's innocence in a criminal trial. Nonetheless, the United States Supreme Court unhesitatingly has found the United States Constitution does not require that a defendant be dressed in civilian garb, or appear unshackled, in the absence of a *demand* therefor by the defendant. (See *McKaskle v. Wiggins* (1984) 465 U.S. 168, 179 ["a defendant . . . may not normally be *forced* to appear in court in shackles or prison garb . . . ." (emphasis added)].) This is so because constitutional guarantees concern "the particular evil" of "*compelling* a defendant, *against his will*, to be tried in" in a challenged manner." (*Estelle v. Williams, supra*, 425 U.S. 501, 507, emphasis added.) Where there is no objection, there is no compulsion, and where there is no compulsion, there is no constitutional violation. (*Id.*, at pp. 512-513 ["the failure to make an objection to the court . . . , for *whatever* reason, is sufficient to negate the presence of *compulsion* necessary to establish a constitutional violation" (emphasis added)]; see also *id.* at fn. 9.)

Likewise, no one need dispute the importance of a criminal defendant's right to a jury trial determination of legally essential facts. (E.g., *United States v. Cotton* (2002) 535 U.S. 625, 634.) Nonetheless, the High Court also has found that right will be forfeited as well, at least to the extent that a criminal defendant acquiesces in a procedure which he (much later) would like to assert is inconsistent with such a right. (*Ibid.* ["The important role of the petit jury did not, however, prevent us in *Johnson* [*v. United States* (1997) 520 U.S. 461] from applying the longstanding rule 'that a constitutional right may be forfeited in . . . criminal as well as civil cases by the failure to make timely assertion of

the right . . . .' *Yakus v. United States*, 321 U.S. 414, 444 [] (1944)."].)[59/] Indeed, just recently the United States Supreme Court adverted to this principle again, pointing out that a material fact, when a defendant claims his Sixth Amendment rights are violated, is "whether the issue was raised below." (*United States v. Booker* (2005) 543 U.S. ___, 125 S.Ct. 738, 769, quoting *In re Winship* (1970) 397 U.S. 358, 364.)

As the United States Supreme Court has recognized, once competent counsel has been appointed, the United States Constitution generally leaves it to the defendant (through his competent counsel) to demand or forfeit such rights as the defendant may have. Fairness, on a fundamental level, obtains so long as counsel has the *opportunity* to object to any imagined infringement upon the defendant's rights. Again, any other approach is an attempt to "rewrite the duties of trial judges and counsel in our legal system." (Cf. *Estelle v. Williams, supra*, 425 U.S. at p. 512.)

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59. Even in the context of the right to have the jury determine legally essential facts, the United States Supreme Court's authority on this point has been consistent for more than a century. (See *Henderson v. Kibbe* (1977) 431 U.S. 145, 154 ["Orderly procedure *requires* that the respective *adversaries'* views as to how the jury should be instructed be presented to the trial judge in time to *enable* him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." (Fns. omitted, emphasis added)]; *Namet v. United States* (1963) 373 U.S. 179, 190 [it amounts to unwarranted "extravagant protection" to find that "the [trial] court committed reversible error because it did not, sua sponte, take some affirmative action" on points "not obviously prejudicial" and "which the petitioner himself appeared to disregard" during the trial]; and see *Harvey v. Tyler* (1864) 69 U.S. (2 Wall.) 328, 339 ["justice itself, and fairness to the court which makes the rulings complained of require that the attention of that court shall be *specifically* called to the *precise* point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception" (emphasis added)]; accord *Lopez v. United States* (1963) 373 U.S. 427, 436.)

b. No Legitimate Basis Appears For A Conclusion That, In The Context Of Jury Instructions, A Criminal Defendant's State Constitutional Rights Persist Despite A Lack Of Objection

Nor does there appear any legitimate basis for a determination that a *state* constitutional protection persists despite a failure to object at trial to an instruction asserted to violate that protection.

> Where, . . . the issue has not been "firmly settled" under state constitutional law [], " 'cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.' "

(*People v. Statum* (2002) 28 Cal.4th 682, 693, citations omitted.)

It does not appear to be a "firmly settled" matter that the California Constitution independently provides a criminal defendant a protection, against jury instructions in general, which is not forfeited when the defendant consents to such instructions at trial. At least outside the context of jury instructions defining the statutory elements of an offense, this Court has observed that "counsel's consent to the instructions bars appellate review" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1133-1134; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223), even in cases where "no tactical purpose . . . appears on the face of the record" (see *People v. Wader* (1993) 5 Cal.4th 610, 657-658; see also *People v. Gallego* (1990) 52 Cal.3d 115, 182-183).

This Court has shown by example why this is not unfair – if a criminal defendant can actually demonstrate it was a prejudicial and unprofessional error for counsel not to raise the objection, relief will be granted despite the forfeiture. (*People v. Wader, supra*, 5 Cal.4th at p. 658.) This is precisely the point implicated by the United States Supreme Court's consistent refusal to find that the United States Constitution places any *sua sponte* duty on trial judges to ensure the adequacy of a jury charge. That is to say, even in the context of jury

instructions, it is the province of partisan counsel, and not an impartial judge, to decide what rights a defendant will choose are sufficiently important enough in the given case that he should object to the slightest infringement. By the same token, only counsel can make the choice whether, in the circumstances of the given case, the potential or theoretical infringement of a right is so unlikely to have any impact that the infringement can be ignored. (Cf. *Estelle v. Williams, supra*, 425 U.S. at p. 512 [appellate courts may not construe the United States Constitution as imposing sua sponte trial court duties, as these "rewrite the duties of trial judges and counsel in our legal system"].)[60/]

Thus, there is no cogent basis for a conclusion that a criminal defendant's rights in the context of jury instructions are not adequately safeguarded by the guarantee of the effective assistance of counsel, and the opportunity to claim and prove a violation of that guarantee when it fails. To the contrary:

> It is both *unfair* and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been

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60. This Court has found a distinction when the instructions concern the definition of the elements of a charged offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1208.) Little wisdom is apparent in this distinction. There are frequently cases in which the evidence of a particular element is so clear that defense counsel reasonably could elect to disregard, without comment on the record, ambiguous or even incorrect instructional language regarding the element, based on an assessment that such language almost certainly will make no difference. If such an assessment is not professional and is further prejudicial, then a criminal defendant's relief can be obtained for that reason. However, even in cases where the assessment was entirely *professional* and counsel's assessment of no likely harm would be correct, this Court still has applied a standard that reversal is warranted unless *the People* can demonstrate harmlessness beyond a reasonable doubt. This standard is unreasonable, both because (1) it operates from the premise that *federal constitutional* guarantees persist despite a lack of objection (see *People v. Cole, supra*, 33 Cal.4th at pp. 1208-1209 – which is incorrect for the reasons already stated in the text, and (2) the ability to claim ineffective assistance of counsel is as sufficient in this instructional context as any other to ensure a criminal defendant's rights are protected.

> easily corrected or avoided. . . . The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in *most* cases *be careful to be silent* as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal. . . .

(*People v. Stowell* (2003) 31 Cal.4th 1107, 1114, emphasis added, citations and internal quotation marks omitted.)

In sum, there is no legitimate benefit to a defendant in the adoption of a rule which allows him to seek reversal based on an instruction when he cannot show counsel's allowance of the instruction was unprofessional and reasonably likely prejudicial. To the contrary, adoption of such a rule will ensure that "in most cases" counsel would ensure that such an error went uncorrected to allow a basis for challenge on appeal. For these reasons, there is no "cogent reason" to find an independent state constitutional protection exists which persists despite a failure to object at trial to an instruction asserted to violate that protection.

c. The People's Right To Due Process Of Law Must Be Construed To Preclude Reversal Based On Instructions To Which There Was No Objection

With these points in mind, it is not difficult to "discover what 'fundamental fairness' consists of in [the] particular situation" (*Lassiter v. Department of Social Services, supra*, 452 U.S. at p. 24-25) presented here, so as to give some meaning to the California Constitution's guarantee that the People must enjoy due process of law. As indicated above, it is *unfair* and promotes inefficiency and game-playing[61] to allow a criminal defendant to raise

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61. For example, a defendant can sit silently when the instruction is omitted and then claim error on appeal (*People v. Morris* (1991) 53 Cal.3d 152, 214-215); or, as here, he can sit silently when the instruction is included and then claim error on appeal (AOB 186-198). Either way, silence enables a later

his objection to an instruction for the first time on appeal. (*People v. Stowell, supra*, 31 Cal.4th at p. 1114.) A defendant who actually cared about the wording of the particular instruction would speak up at trial, which would allow the People (and the court) to fix any defects and a verdict could be had.

As a concrete example, in this case the People's case depended not at all on ensuring the jurors did not share notes or that the jurors did not request readbacks. Thus, has appellant been truly concerned about the challenged instructional language, and therefore voiced such concern, it is quite likely the People would not have objected if appellant sought a modification allowing the jurors to share notes and a further modification elaborating generously that the jurors could have a readback for any reason and at any time they chose. Instead, having conducted a long and arduous trial, and having been led to believe that appellant and defense counsel agreed to the jury charge (at least, as to the subject of the instant objections), the People now are threatened that the resulting, hard-won judgment is in jeopardy, and that if a federal theory can be managed the People will have to disprove prejudice by the highest standard of proof known to the legal system.

That is fundamentally unfair. That is a sort of legal entrapment of the People that has to be forbidden if the People's right to due process of law is to have meaning. Accordingly, this Court should recognize that section 29 of article I of the California Constitution precludes reversal based on appellant's claim of instructional error.[62/]

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appellate claim.

62. However, when review of an instructional claim would *not* lead to reversal, no reason is apparent why this Court could not, as is common, comment on the merits and thereby obviate the need for a later challenge to counsel's performance.

2. Appellant Abandoned Any Federal Constitutional Guarantee Which Was Inconsistent With The Instructions When, With Full Awareness Of The Instructions, He Consented To Proceed To Verdict Without Objection Or Request For Admonition

As previously indicated, the United States Supreme Court has found that a failure by a counseled defendant to object to a threatened infringement of a constitutional protection amounts to an abandonment of that protection to the extent of that infringement, because the lack of objection is inconsistent with the compulsion which is the necessary ingredient of a constitutional violation. (*Estelle v. Williams, supra*, 425 U.S. 501, 507, 512-513; *Yakus, supra*, 321 U.S. 414, 444.) As previously indicated, there is no exception when the protection in question implicates the right to a jury determination of facts. (*United States v. Cotton, supra*, 535 U.S. 625, 634; see *Namet v. United States, supra*, 373 U.S. 179, 190 [it amounts to unwarranted "extravagant protection" to find that "the [trial] court committed reversible error because it did not, sua sponte, take some affirmative action" on points "not obviously prejudicial" and "which the petitioner himself appeared to disregard" during the trial]; accord, *United States v. Booker, supra*, 125 S.Ct. 738, 769.)

To the extent any of the challenged instructional language might be deemed to have infringed on some constitutional protection, the lack of objection amounted to an abandonment of that protection to the same extent, and there is nothing now to vindicate.

B. For Lack Of Merit, Appellant's Challenge To The Instructional Language Fails

1. The Jurors Were Instructed They Could Seek Readbacks

The premise of appellant's argument regarding readback of testimony is his assertion the jury charge left the jurors with the impression that readbacks could only be requested if a juror's memory conflicted with his own notes.

(AOB 187.) However, this argument proceeds on the premise that the following language was absent from the jury charge:

> If you have a serious question as to what the evidence is, you can always request the court reporter to read back any portion of the testimony. As I have told you, we have daily transcripts of all of the testimony, so it's not going to be any serious problem for us to read back any testimony that you may need during the course of your deliberations.

(35 RT 15973.)

Irrespective of what jurors conceivably might infer in the absence of this language, the fact is that such language was not absent. Because this language could not leave any juror with the impression that there was a restriction (beyond a subjective sense of need) on the ability to seek a readback of testimony, it is impossible to engage the argument further.

2. The Jurors' Ability To Seek Readbacks Obviated Any Problem Resulting From Inability To Share Notes

As previously stated, the following language was included in the jury charge:

> You were allowed to take notes, and you may use your notes during your deliberations. Keep in mind, however, that notes are only an aid to memory and should not take precedence over independent recollection. A juror who did not take notes should rely on his or her independent recollection of the evidence and not be influenced by the fact that other jurors did take notes. Notes are for the notetaker's own personal use in refreshing his or her recollection of the evidence.

(35 RT 15937-38.)

Appellant has several complaints about this language, few of which merit much discussion.

a. Auditory Recall

Appellant asserts this language "requir[ed] jurors to rely on their own recall no matter what." (AOB 189.) That assertion is inconsistent with the trial court's instruction that jurors were free to seek readbacks (35 RT 15973), which was the most reliable record of the evidence.

b. Note-sharing

(i) Section 1137

Appellant points out that section 1137 provides, "Upon retiring for deliberation, the jury . . . . may take with them . . . notes of the testimony or other proceedings on the trial, taken by themselves or any of them, . . ." He argues this language "appears to contemplate the free exchange of notes *between* jurors." (AOB 192.)

Actually, it does so appear. Thus, arguably the jury charge was a departure from section 1137. That departure is governed in the first instance by section 1404, which provides:

> Neither a departure from the form or mode prescribed by this [Penal] Code in respect to any . . . proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.

From this language, two points readily appear. First, this language cannot reasonably be construed to grant a criminal defendant a substantial right to *adherence* to the "form or mode" set forth by the procedural provisions of the Penal Code. This is so because otherwise a "departure" would *automatically* amount to prejudice of that same substantial right to adherence, and the word "unless" would be functionless.[63/] Rather, the substantial right or rights in

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63. One presumes "the Legislature intended 'every word, . . . to have meaning and to perform a useful function.' " (Cf. *Garcia* v. *McCutchen* (1997) 16 Cal.4th 469, 476.)

question necessarily must be established by other authority.

Second, a departure is not invalid "unless" such prejudice appears, which means it is presumptively the case that it is not invalid. Thus, to show an infringement, a defendant must affirmatively demonstrate prejudice (or its tendency). (Cf. *People v. George* (1994) 30 Cal.App.4th 262, 275 [noting" 'well established' " rule that " 'where a statute first defines an offense in unconditional terms and then specifies an exception to its operation, the exception is an affirmative defense to be raised and proved by the defendant' "].)

Turning to section 1137, then, the first question is what substantial right was to be facilitated by permitting jurors to share their notes. There is only one substantial right which conceivably is implicated – the right of a criminal defendant to be tried by jurors who have as much of the evidence as is needed at their disposal. In 1872, when section 1137 was enacted, note-taking by jurors doubtless was critical, because there was no guarantee that a verbatim record of the testimony would be available. Moreover, sharing of notes among jurors – which notes were likely to be incomplete unless at least one juror (almost certainly male) happened to be very good at shorthand (very possibly not) – would tend to round out the recall of the evidence, given that different jurors might be expected to focus on different matters.

However, today (and years ago during the trial) such note-taking by jurors simply does not fulfill the same need. In a jury trial, a professional court reporter records verbatim every word of testimony, and that testimony is available to a juror for the asking. Thus, an inability to share notes has no tendency in reason to undermine the jurors' ability to know the entirety of the evidence, and therefore has no tendency in reason to undermine the defendant's substantial right to have the jurors apprised of any and all testimony in the case.

Appellant fails to demonstrate that any departure from section 1137 was invalid.

(ii) Ramifications

Appellant also asserts the ban on note-sharing would tend to imply that a jurors should automatically reject any statements by other jurors, thus destroying the essence of deliberations. (AOB 193-195.) This argument is presented on the premise that the jurors would not understand what any normal person would understand from the following language:

> Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and the instructions with your fellow jurors.
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.
> [¶] . . . [¶]
> The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of the deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown that it is wrong. . . .

(35 RT 15936-38);

No rational juror could maintain the belief posited by appellant, that appellant had some burden in any respect, after having in mind the foregoing language to consider along with the challenged instructional language.

Appellant's challenge must be denied.

VI.

APPELLANT'S "DIRECT EVIDENCE" INSTRUCTIONAL CHALLENGE MUST BE DENIED

The jury charge included the following language:

> . . . Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others.

(35 RT 15936);

> Evidence is either direct or circumstantial.
> Direct evidence is evidence that directly proves a fact, without the necessity of an inference. It is evidence which, by itself, if found to be true, establishes that fact.
> Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.
> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of fact established by the evidence.
> It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.
> However, a finding of guilt may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime, but, two, cannot be reconciled with any other rational conclusion.
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
> Also, if the circumstantial evidence, as to any particular count, is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt.
> If, on the other hand, one interpretation of such evidence appears to you

to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(35 RT 15938-40);

A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.
The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crimes with which he is charged.
If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether the defendant was the person who committed the crime, you must give him the benefit of that doubt and find him not guilty.

(35 RT 15948-49).

Appellant asserts the jury charge had a tendency to suggest the jurors could convict him based on "direct evidence" even if the jurors reasonably doubted whether the charges were true. (AOB 199-208.) However, this challenge must be denied.

A. For Lack Of Objection, The Judgment May Not Be Reversed Based On The Jury Charge, And The Lack Of Objection Abandoned Any Constitutional Protection

Appellant did not object to the jury charge on the grounds now asserted, nor does he allege and prove the lack of objection amounted to ineffectiveness of counsel. For reasons previously stated (Arg. V.A.2, *ante*), any federal

constitutional protection was abandoned to the same extent appellant failed to object to any imagined infringement upon such protections. For reasons previously stated (Arg. V.A.1, *ante*), the People's right to due process of law (Cal. Const., art. I, § 29) precludes reversal based on such an objection made for the first time now. For these reasons, the challenge must be denied.

B. For Lack Of Merit, Appellant's Challenge To The Instructional Language Fails

Appellant complains that jurors were instructed specifically on how "guilt" could be determined when that determination involved facts established by circumstantial evidence. He argues the jurors would infer such instruction logically would imply such determinations would not apply if the jurors convicted based solely on facts proven by direct evidence, and that therefore the jurors could convict in that instance without finding such facts were proved beyond a reasonable doubt. (AOB 199-208.) There are at least two fatal flaws in appellant's logic.

First, appellant's theory – of a conviction based solely on facts proven by direct evidence – is a theory not implicated in this case, or virtually any case. In every crime there must be union of act and either intent or criminal negligence (§ 20) – in this case, intent (see 35 RT 15960-63). Because in this case (as in virtually every case), it was necessary for each crime to *infer* intent, by definition every crime with which appellant was charged required "a finding of guilt . . . based on circumstantial evidence." (35 RT 15930.)[64/]

Appellant does not identify a single crime, for which he was convicted, from which the jurors could have inferred the necessary mental state in the absence of an essential preliminary finding that he committed the charged

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64. Appellant saves for a later argument his theory that the foregoing instructions were improper even as to evaluation of circumstantial evidence. (See AOB 206, fn. 64.) The response to that theory will likewise come later.

physical acts. As a result, the fact appellant committed the physical acts necessary for the charged offenses amounted to *circumstantial evidence* crucial to support the inference that appellant harbored the *intent* necessary for the charged offenses. However, the jurors were instructed that if a predicate fact was circumstantial evidence of an inference essential to guilt (here, the essential inference of intent), then the predicate fact "must be proved beyond a reasonable doubt." This was sufficient to ensure the jurors found all elements of appellant's crime (both physical acts and intent) were proven beyond a reasonable doubt. Nothing more is actually necessary to dispose of appellant's faulty logic.

But there is a second, and more critical, failing in appellant's logic. Contrary to appellant's theories, even were it possible for jurors to find every element of the crime proven by direct evidence, the foregoing instructions unambiguously required the jurors to reach an abiding conviction as to the truth of those elements before a guilty verdict could be returned. According to appellant's theory, as a first point, the jurors would observe that the language of the circumstantial evidence instructions did not include reference to direct evidence, and therefore the jurors would not apply those instructions to direct evidence. From this, appellant simply proceeds to the second point that, when testimony included direct evidence of a fact, "a juror would have been free to put the testimony into the 'true' column without distinguishing between true beyond a reasonable doubt and probably true." Appellant then proceeds to the third point that, "then – after finding that there wasn't any evidence to speak of on the issue . . . to rely on the testimony without qualification when deciding whether [the issue] had been proven beyond a reasonable doubt . . . ." (AOB 206.) However, one cannot get to the second point from the first point.

Nothing in the instructions suggested to jurors that some sort of intermediate "column" placement analysis was permissible, in which a fact

never established as true beyond a reasonable doubt could support a later determination that guilt had been proven beyond a reasonable doubt merely because opposing evidence was absent. For example (to use appellant's example), if from Vernell Dodson's testimony a juror concluded it was "probably true" that appellant once said he wanted to kill Yolanda, then at the end of all the evidence nothing in the instructions would permit the juror to conclude that fact was anything other than "probably true." Nothing in the instructions allowed a finding of "probably true" to become "true beyond a reasonable doubt" merely by maturing from incubation for an unspecified time in a " 'true' column' " (AOB 206).

To the contrary, in unequivocal terms, the jury was instructed that appellant "is entitled to a verdict of not guilty" unless is "guilt is satisfactorily shown." That meant, according to the instruction, that "the People [had] the burden of proving him guilty beyond a reasonable doubt." (35 RT 15948.)

But, reasonable doubt was not defined in terms of "probably true," or "probably true" combined with "there wasn't any other evidence to speak of on the issue." Rather, reasonable doubt meant, "after the entire comparison and consideration of all the evidence," the juror "cannot say [he or she] feel[s] an *abiding conviction* of the *truth* of the charge." (35 RT 15948, emphasis added.) No rational juror could read these terms in the manner theorized in appellant's argument – the instruction simply is not susceptible to such a reading. Further, because the jurors had to consider all instructions together (see 35 RT 15936), and no other language advised the jurors of a contrary definition of reasonable doubt, and no other language told jurors of another circumstance under which appellant would not be "entitled to a verdict of not guilty," appellant's argument fails in its entirety for lack of logic.

Appellant's challenge must be denied.

VII.

APPELLANT'S "DILUTED THE REASONABLE DOUBT" INSTRUCTIONAL CHALLENGE MUST BE DENIED

In addition to the foregoing language regarding direct and circumstantial evidence, the jury charge included discussions on how to consider testimony and evaluate credibility. Appellant complains that, among these, the following words appeared:"guilt," "innocence," "existence," "absence," "reasonableness," "unreasonableness," "establish," "probability of truth," and, "Neither side is required to call as witnesses all persons who may have been present at . . . or who may appear to have some knowledge of these events." (AOB 209-234.) In appellant's view, this "plethora of problematic phrases . . . conspired in combination to make it likely that at least one juror's verdict was predicated on a standard closer to reasonableness than beyond a reasonable doubt." (AOB 210.) This challenge must be denied.

A. For Lack Of Objection, The Judgment May Not Be Reversed Based On The Jury Charge, And The Lack Of Objection Abandoned Any Constitutional Protection

Again, appellant did not raise his objections below, and his opening brief does not allege and prove the lack of objection amounted to ineffectiveness of counsel. For reasons previously stated (Arg. V.A.2, *ante*), any federal constitutional protection was abandoned to the same extent appellant failed to object to any imagined infringement upon such protections. For reasons previously stated (Arg. V.A.1, *ante*), the People's right to due process of law (Cal. Const., art. I, § 29) precludes reversal based on such an objection made for the first time now. For these reasons, the challenge must be denied.

B. For Lack Of Merit, Appellant's Challenge To The Instructional Language Fails

Moreover, appellant's logic is again faulty.

1. The Jury Charge Did Not Purport To Define Reasonable Doubt In Terms Of "Guilt," "Innocence," "Existence," "Absence," "Reasonableness," "Unreasonableness," "Establish," Or "Probability"

Appellant acknowledges this Court has rejected his claims, but he finds this Court's logic unpersuasive. (AOB 210, *passim.*) However, appellant's discussion carefully omits reference to the actual language of the reasonable doubt instruction. (AOB 209-234.) Again, it is useful to return to that language because, again, that was the *only* language in the entire jury charge which instructed the jurors under what circumstance appellant would not be "entitled to a verdict of not guilty." The language:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
> Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(35 RT 15948.)

A juror with basic reading comprehension, upon examination of this language, cannot fail to notice the terms "innocent" and "guilt" in the first paragraph. However, such a juror also cannot help but observe that, whatever "innocent" implies, appellant is already *presumed* innocent, and the contrary must be not only "proved," but also "satisfactorily shown." This same

"presumption" that the defendant is "innocent" has the effect of placing a "burden" on the People. That burden, however, is not merely that the defendant is "guilty." Rather, the People must prove the defendant is "guilty beyond a reasonable doubt."

Thereafter, "reasonable doubt" is defined. Notably, that definition does not include any word which appellant might worry is subject to conflicting meaning. The definition of "reasonable doubt" does not even once refer to the word "guilt," or "innocence," or "existence," or "absence," or "reasonableness," or "unreasonableness," or "establish," or "probability." The definition refers to the "truth of the charge," and whether the juror, "after the entire comparison and consideration of all the evidence," "feel[s] an *abiding conviction* to a moral certainty" that the charge is true.

No juror with basic reading comprehension could have read this instruction without concluding that appellant was "entitled to a verdict of not guilty" (an unambiguous phrase) unless, after considering and comparing all the evidence, the juror internally felt "an abiding conviction to a moral certainty of the truth of the charge[s]."

Again, no other instruction purported to explain a circumstance under which appellant would *not* be "entitled to a verdict of not guilty." No other instruction purported to *define* "reasonable doubt." Thus, irrespective of the myriad of theories appellant conjures regarding the existence of "problematic phrases," in the end there is nothing more to say. (Cf. *Cupp v. Naughten* (1973) 414 U.S. 141, 149-150 ["The jury here was charged fully and explicitly about the presumption of innocence and the State's duty to prove guilt beyond a reasonable doubt. Whatever tangential undercutting of these clearly stated propositions may, as a theoretical matter, have resulted from the giving of the instruction on the presumption of truthfulness is not of constitutional dimension. The giving of that instruction, whether judged in terms of the

reasonable-doubt requirement in *In re Winship, supra*, or of offense against 'same principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' [citation], did not render the conviction constitutionally invalid."].)

2. There Was No Failing In Instructing That "Neither Side Is Required To Call As Witnesses All Persons Who May Have Been Present At . . . Or Who May Appear To Have Some Knowledge Of These Events"

This leaves appellant's disquiet that the statement, "Neither side is required to call as witnesses all persons who may have been present at . . . or who may appear to have some knowledge of these events" (35 RT 15940-41) might have "suggested [appellant] was required to at least call some of them" (AOB 231). Again, appellant finds unpersuasive the fact this Court has rejected the argument (AOB 232, citing *People v. Daniels* (1991) 52 Cal.3d 815, 872), but, again, appellant's presentation of his argument proceeds by actively avoiding the other instructional language, which was quite impervious to misconstruction by any unbiased and reasonable person.

Nothing advanced by appellant can counter the express terms of the reasonable doubt instruction, which explains that the *only* circumstance under which appellant was not "entitled to a verdict of not guilty" was if and when the "the People" met "the burden of proving him guilty beyond a reasonable doubt." (See 35 RT 15945.)

VIII.

MURDERERS OF MULTIPLE VICTIMS DIFFER FROM MURDERERS OF SINGLE VICTIMS

Appellant mistakenly asserts, "The special circumstance of multiple-murder fails to narrow in a constitutionally acceptable manner the class of persons eligible for the death penalty." (AOB 235-239, citing, inter alia, *People*

v. Green (1980) 27 Cal.3d 1, 61.)

The United States Constitution requires a death penalty scheme to limit defendants' eligibility for the death penalty, and to do so by establishing limiting standards in the absence of which death may not be imposed. Such standards, which may be satisfied "in the definition of the crime or in a separate sentencing factor (or in both)," must meet two criteria. First, the standards "may not apply to every defendant convicted of a murder[.]" Instead, they "must apply only to a subclass of defendants convicted of murder." "Second, the aggravating circumstance may not be unconstitutionally vague" – which means " 'the statutory language defining the circumstance' " must not be " too vague to provide any guidance to the sentencer.' " (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, internal citations omitted.) California's death penalty scheme meets these standards based on the natures both of the offender and of the offense.

In California, one narrowing criteria is that, all other things being equal, one whose commission of first degree murder is special due to the circumstance that he has committed another murder is eligible for the death penalty, while another first degree murderer may not be eligible. (§ 190.2(a)(3).) However, appellant offers no argument that the multiple-murder special circumstance "appl[ies] to every defendant convicted of a murder[]," and he does not suggest that the special circumstance is vague in any way. (AOB 235-239.) Thus, appellant offers no argument which would demonstrate the special circumstance of multiple murder fails the test set forth by the United States Supreme Court.

Instead, appellant argues the penalty of death is simply unconstitutional. He does not say so directly, but that is what he argues. For example, he argues the penalty of death is unconstitutional if a jury has the power to extend mercy to one multiple murderer while another jury has the power not to extend mercy to another multiple murderer who, in appellant's opinion, was not quite as bad.

Appellant condemns this as "wanton and freakish." (AOB 236-237.) However, the power of one sentencer to extend mercy to one multiple murderer who deserves death, and the power of another sentencer to decline mercy to another multiple murderer who deserves death (but perhaps not as much) cannot be eliminated without eliminating the ability of a sentencer to show mercy or not. Appellant does not show an example of a death penalty system which would be constitutional and yet would eliminate the possibility of such "wanton and freakish" results, irrespective of what the special circumstance would be; which means his is merely a frivolous attack on the constitutionality of the power of a sovereign to inflict death as a punishment. No additional response to that attack is warranted. (And see *People v. Sapp, supra*, 31 Cal.4th at pp. 286-287.)

IX.

APPELLANT'S CHALLENGES TO THE DEATH-QUALIFICATION OF THE PENALTY-PHASE JURY MUST BE DENIED

Appellant mistakenly demands reversal because, over his objection during the death qualification of the jury which re-tried the penalty phase, the court (1) excused prospective juror G. for cause (45 RT 19614-15; AOB 240-294), (2) excused prospective juror C. for cause (45 RT 19663-64; AOB 295-302), and (3) limited appellant's voir dire to preclude a general preview of the People's case in aggravation (see 42 RT 18667-69, 18708, 18720, 18723; 45 RT 19543-48; AOB 303-372).

Although appellant makes his arguments under three separate headings, jointly the excusals and the voir dire restriction actually present two sides of the same legal issue and the rejection of those arguments logically flows from the same body of law.

As will follow, this Court long ago properly interpreted the law of death qualification to require only that a juror be willing to participate in the statutory scheme for death penalty *selection* once a criminal defendant has been found *eligible* for death or life without parole (sometimes, herein, "life"). It follows that the only requirements of an unbiased juror is that he or she (1) be willing to sit on a penalty phase jury, (2) be not inalterably opposed to death or life in every case, and (3) be not inalterably opposed to death or life based on the particular statutory criteria which make the defendant eligible for death in that case. With only few exceptions, this Court has adhered to this sound standard. Respondent respectfully submits this Court should re-affirm that standard and accordingly reject appellant's challenges.

A. The Law Of Death-Penalty Qualification

1. Overview Of The History Of The Law Setting Forth The Correct Standard Of Juror Bias – The *Fields* Standard

a. *Witherspoon v. Illinois*

It began with *Witherspoon v. State of Ill.* (1968) 391 U.S. 510 ("*Witherspoon*"). In *Witherspoon*, the United States Supreme Court recognized that a state is empowered to exclude from a capital jury

> those who say [1] that they could never vote to impose the death penalty or [2] that they would refuse even to consider its imposition in the case before them.

(*Witherspoon, supra*, 391 U.S. 510, 513-514, brackets added.)

However, at the same time, the Court found as matter of constitutional law that

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

(*Id.* at p. 522.)

In elaboration, the Court stated in a footnote:

> Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty *in the case before him*. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death *regardless of the facts and circumstances* that might emerge in the course of the proceedings

(*Id.* at p. 522, fn. 21, emphasis added.)

To make sure this rule was not too broadly construed, the Court took pains to "repeat" that a state retains the ability to exclude

> those who made unmistakably clear [] that they would automatically vote against the imposition of capital punishment without regard to *any evidence* that might be developed at the trial of the case before them, ...

(*Ibid.*, emphasis added.)

b. *People v. Fields*

While the rule of *Witherspoon* was fairly unmistakable in the context of jurors who could not impose death in *any* case whatsoever, there was conceivably some ambiguity as to what was meant by jurors' ability to follow the law "in the case before them." However, roughly 15 years later – and years after *Furman v. Georgia* (1972) 408 U.S. 238 and *Gregg v. Georgia* (1976) 428 U.S. 153 forced a reworking of capital schemes in the United States – this Court explored that meaning.

In *People v. Fields* (1983) 35 Cal.3d 329 ("*Fields*"), this Court found it necessary to confront and resolve the question "whether the dismissal of a juror

who would automatically vote against the death penalty in the case at hand, but not necessarily in some other case, violates *Witherspoon*." (35 Cal.3d 329, 356.) This Court observed the United States Supreme Court had yet to explicitly confront "a juror who affirms only that he would automatically vote against death in the case before him," so as to flesh out by what standard such a juror "can be excluded for cause." (*Ibid.*)

The charges which made defendant Fields eligible for death were a charge of murder and a special circumstance of "willful, deliberate, and premeditated murder during the commission of a robbery." (*Fields, supra*, 35 Cal.3d 329, 336.) During the death-qualification voir dire in *Fields*, prospective juror Harris was excused for cause; she had stated she might vote for death in some case, but never in a case "involving these charges and special circumstances." (*Fields, supra*, 35 Cal.3d 329, 354.) The opinion noted that "Harris knew nothing of the *evidence* in this case except what she could discern from the charges and special circumstances." (*Id.* at p. 358, fn. 13, emphasis added.)

Prospective juror Rumbo was also excused. Rumbo stated he would never vote for death "in this case." (*Id.* at p. 356, italics omitted.) However, despite Rumbo's words, the opinion noted the record showed that Rumbo's "opposition to the death penalty" was in no way "limited to this specific case." Rather, Rumbo was among a group of "excluded juror[s] [who] would have cast an automatic vote against the death penalty," period. (*Id.* at p. 358, fn. 13.)

With these facts established, this Court in *Fields* considered the legal question of what amounted to *case-specific* bias warranting for-cause excusal of a prospective juror. First, this Court summarized *Witherspoon*:

> In *Witherspoon*, the court noted that jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him.

> The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." (391 U.S. at p. 522, fn. 21 [].)

(*Fields, supra*, 35 Cal.3d 329, 356, italics in *Fields*.)

This Court reasoned, "The implication of this language is that a juror who is not willing to consider the death penalty *in the case before him*, but is irrevocably committed before trial to vote against that penalty, can be excluded for cause." (*Fields, supra*, 35 Cal.3d 329, 356-357, emphasis added.)

> This Court then summarized *Adams v. Texas* (1980) 448 U.S. 38:
> In *Adams v. Texas, supra*, 448 U.S. 38, the Supreme Court reviewed the *Witherspoon* decision and later cases following that precedent. The *Witherspoon* test, the court stated, "seems clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." (P. 44 [].) Thus, under *Witherspoon* and subsequent cases, "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (P. 45 [].)

(*Id.*, 35 Cal.3d 329, 357.)

Finally, this Court announced its reasoning regarding what the United States Supreme Court meant (or would have to mean) regarding case-specific bias – i.e., what was, and what was *not*, cause to find a juror was unable to contemplate death as a penalty option "in the case before him." This Court found "the case" necessarily implicated the *statutory* death-eligibility criteria:

> The jurors at issue here were called to decide a case arising under the 1977 death penalty statute. The Legislature had determined that death was a possible punishment for *premeditated murder during the commission of robbery*, and required the jury in deciding the question to "consider, take into account, and be guided by" listed aggravating and

> mitigating facts. A juror who resolved in advance not to impose the death penalty in the case before him, whatever his views might be in other cases, could not "conscientiously apply the law as charged by the court" (*Adams v. Texas, supra*, 448 U.S. 38, 45 []) because he had already determined the penalty without considering the relevant aggravating and mitigating factors. It follows that such a juror may be dismissed for cause without violating the constitutional doctrine expounded in *Witherspoon* and *Adams*.

(*Fields, supra*, 35 Cal.3d 329, 357, emphasis added.)

Thus, *Fields* addressed the fitness of a juror who knew none of the *evidence* in the case, and who knew only of the statutory charge and special circumstance which amounted to death-eligibility criteria. That juror was unable to accept those death-eligibility criteria as a starting place for considering death as a possible penalty, even if the juror might consider death in some other case.[65/] In *Fields* this Court found the excusal of such a juror would not violate the United States Constitution, because such a juror is unable to adhere to the Legislature's determination that death might be appropriate under that *statutory* category of death-eligibility, and by definition that juror cannot obey the statutory scheme which requires consideration whether the evidence shows death to be the appropriate penalty. (*Fields, supra*, 35 Cal.3d 329, 357-358.)

It takes no speculation to conclude that when this Court referred to a juror's ability to consider a penalty "in the case before him" (*Fields, supra*, 35 Cal.3d 329, 356-357), this Court was referring solely to whether a juror would refuse to accept the statutory capital murder criteria as a starting place for

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65. In *Fields*, this best described juror Harris. (*Fields,* supra, 35 Cal.3d 329, 354 & 358, fn. 13.) Oddly, the opinion indicated the inquiry into case-specific bias was raised by excusal of juror *Rumbo*. (*Id.* at p. 356.) But, the opinion noted Rumbo's inability to vote for death was universal rather than case-specific . (*Id.* at p. 358, fn. 13.) Thus, respondent respectfully submits the opinion's failure to reference Harris's excusal as "rais[ing] the question" (*id.* at p. 356) was inadvertent.

consideration of death as a possible penalty. First, the opinion twice quoted the voir dire references to juror Harris's complete refusal to vote for death in a case "involving these charges and special circumstances." (*Fields, supra*, at p. 354 [phrase twice stated, once in italics].) Second, the analysis focused on the fact the Legislature designated the proof of those charges and special circumstances as sufficient to *compel* consideration of death as a possible penalty. (*Id.* at p. 357.) Third, in a following footnote the opinion specifically referenced the fact "Harris knew nothing of the evidence in this case except what she could infer from the charges and special circumstances." (*Id.* at p. 358, fn. 13.) Thus, on the one hand *Fields* established that "the case" implies a reference to the *statutory criteria* which the Legislature has used to define when a murder conviction requires contemplation of death as a possible penalty.

On the other hand, this Court was likewise entirely clear that a juror's ability to consider a penalty "in the case before him" must *exclude* any reference to the juror's potential reaction to some *evidence* which may be produced in the proceedings. In the same footnote 13, this Court was explicit:

> When the court excludes a juror on this ground, however, it must take care to avoid violation of *Witherspoon's* command that a juror can be dismissed for cause only if he would vote against capital punishment "without regard to *any evidence* that might be developed at the trial of the case . . . ." (391 U.S. at p. 522, fn. 21 [].) If a prospective juror has been *informed of the evidence* to be presented, his asserted *automatic* vote may be *based upon this information*, in which case exclusion of the juror because of his views on the death penalty would violate *Witherspoon*. For example, a juror who announces that he would automatically vote against death in the case before him because he has been told (whether true or not) that the prosecution case rests entirely on circumstantial evidence is not casting a vote *without regard to the evidence*, and cannot be excluded under the *Witherspoon* formula.

(*Fields, supra*, 35 Cal.3d 329, 358, fn. 13, emphasis added.)

If follows that *Fields* is authority for a basic and relatively clear proposition. While the case announces that its rule applies to a juror who

would automatically vote against death "in the case at hand" (*Fields, supra*, 35 Cal.3d 329, 356) or "in the case before him" (*id.* at pp. 356-357), the rule does not imply "the case" which is established by any part of the specific *evidence* to be introduced at the penalty-selection phase. Rather, "the case" is defined solely by the statutory elements, i.e., the charges and special circumstances which make it necessary for there to be a penalty-selection phase.

As *Fields* recognized, the Legislature has declared that the proof of these elements, even without more, represents a *legal boundary* at which the potential for a penalty of death must be accepted. Thus, if a juror cannot or will not accept that boundary as a place to begin contemplation of the penalty of death, the juror cannot or will not adhere to the statutory scheme for penalty selection. In contrast, the *Fields* refusal to consider a juror's reaction to evidence demonstrates recognition that, once the legal boundary has been passed (i.e., the juror is willing to accept that a conviction for capital murder requires consideration of both penalties), nothing in the statutory scheme prevents such a juror from ultimately *judging* that the moral weight of some aggravating fact is overwhelmingly probative as to the appropriateness of a vote for death. Necessarily, "cause" for excusal has not been shown if – when asked and *compelled to answer* during voir dire – that same juror can accurately predict that he will find that fact overwhelmingly probative as to the appropriate penalty.

The converse applies as well. Once the legal boundary has been passed, nothing in the statutory scheme prevents such a juror from ultimately *judging* that the moral weight of some mitigating fact is overwhelmingly probative as to the appropriateness of a vote for life. Again, "cause" for excusal has not been shown if that juror, when asked and compelled to answer during voir dire, has sufficient acuity to recognize that his assessment of the overwhelmingly probative nature of the mitigation evidence very likely will not change.

c. ***Wainwright v. Witt***

A bit more than one year after *Fields*, language used in *Wainwright v. Witt* (1985) 469 U.S. 412 ("*Witt*") would tend to confirm the standard, set forth in *Fields*, that a juror's bias is to be determined based solely on the juror's ability to follow the statutory scheme.

In *Witt*, the United States Supreme Court observed that, since its decisions in *Furman v. Georgia, supra*, and *Gregg v. Georgia, supra*, death penalty schemes could not simply permit juries "unlimited discretion in choice of sentence." (*Witt, supra*, 469 U.S. 412, 421-422.) Rather, a statutory scheme is typically in place to determine the appropriateness of the penalty of death, and thus it is critical that a state be permitted to excuse a juror who will not "follow the statutory scheme . . . ." (*Witt, supra*, at p. 422.) The *Witt* Court specifically reaffirmed *Witherspoon*'s recognition that a juror may be excused if his view's "might frustrate administration of a State's death penalty scheme." (*Id.* at p. 416.) In light of these observations, the *Witt* Court announced that the question of whether "a prospective juror may be excluded for cause because of his or her views on capital punishment" was to be answered affirmatively if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Id.* at p. 424.)

Witt also addressed other issues relevant here. Having reaffirmed the proper *question*, the *Witt* Court also announced that the *answer* thereto did not have to appear "unmistakably" at the trial level, and further that the complete basis for the trial judge's ruling likely will be impossible to discern at the appellate level.

As to the trial level, the Court explained:

> . . . [T]his standard . . . does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results

> in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

(*Witt, supra*, 469 U.S. 412, 424-425.)

Rather, despite some "lack of clarity" in the words used, "there will be situations were the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." (*Id.* at pp. 425-426.) It is not required, for excusal, that it be certain or definite that the juror will *not* follow the statutory scheme; it is enough that the juror cannot be "trusted" to follow it. (*Id.* at p. 419; compare *id.* at p. 423 ["we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite *likely* will be biased in his favor" (emphasis added)] with *People v. Hayes* (1999) 21 Cal.4th 1211, 1250 [even "reasonable likelihood" that a jury in the county cannot be fair sufficient for defendant to obtain change of venue].)

Importantly, the trial judge does not merely accept at face value the words uttered by the juror, but rather the judge must also evaluate the "demeanor" of the juror and ultimately assess the "credibility" of the juror's statements. (*Witt, supra*, 469 U.S. 412, 428; see *id.* at p. 434 ["Thus, whatever ambiguity respondent may find in this record, we think that the trial court, aided as it undoubtedly was by its assessment of Colby's demeanor, was entitled to resolve it in favor of the State."].)

On the matter of review, the *Witt* opinion found it constitutional and appropriate for an appellate court to recognize the basic reality that the evidence before the trial judge commonly cannot be reconstituted on appeal to permit accurate second-guessing:

> [T]he *manner* of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.

(*Witt, supra*, 469 U.S. 412, 428, fn. 8, emphasis added, citation and internal quotation marks omitted; accord, *Gomez v. United States* (1989) 490 U.S. 858, 875 ["But only words can be preserved for review; no transcript can recapture the atmosphere of the voir dire, . . ."].)[66/]

d. General Consistency Of California Case Law After *Witt, Through Morgan v. Illinois, And Through People V. Livaditis*

It does not appear there was much discussion of the *Fields* standard for case-specific bias for several years, until this Court reaffirmed the *Fields* standard over a dissent. The majority opinion in *People v. Clark* (1990) 50 Cal.3d 583 ("*Clark*"), found entirely proper a trial judge's refusal to allow voir dire to determine "whether the *evidence* of serious burn injuries suffered by the victims would cause a jury to *automatically* vote for the death penalty, ..." (*Id.* at pp. 596-597.) Despite the fact defendant Clark ultimately may have had the opportunity to engage in such questioning at some later point (see *id.* at p. 596, fn. 3), the *Clark* opinion specifically reaffirmed that proper voir dire in this area "seeks to determine only the views of the prospective jurors about capital punishment in the abstract," and "without regard to the evidence produced at trial." (*Id.* at p. 597.)

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66. Such deference was compulsory in *Witt,* which involved federal habeas review of a state conviction. (*Witt, supra*, 469 U.S. 412, 426-427.) A state appellate court may constitutionally adopt or not adopt a standard of deferential review of the trial judge's findings. (*Greene v. Georgia* (1996) 519 U.S. 145, 146-147.) However, in light of the practical considerations discussed in *Witt,* it appears most sound for this Court to adhere to a deferential standard. (*People v. Weaver* (2001) 26 Cal.4th 876, 910.)

> The inquiry is directed to whether, *without knowing the specifics of the case*, the juror has an "open mind" on the penalty determination. There was no error in ruling that questions related to the jurors' *attitudes toward evidence* that was to be introduced in this trial could not be asked during the sequestered *Witherspoon-Witt* voir dire.

(*Clark, supra*, 50 Cal.3d 583, 597, emphasis added.)

The *Clark* opinion specifically referenced footnote 13 of *Fields*:

> We noted in *People v. Fields, supra*, 35 Cal.3d 329, 358, footnote 13 [], that excusing a juror for cause because he would vote against the death penalty based on *evidence to be presented* would violate *Witherspoon*.

(*Clark, supra*, 50 Cal.3d 583, 597, fn. 4, emphasis added.)

There were dissenting opinions in *Clark*, but Justice Kaufman stood alone in his opinion that the majority view "unduly and improperly restricts the scope of the death qualification voir dire." (*Clark, supra*, 50 Cal.3d 583, 647 (dis. opn. of Kaufman, J.).) Justice Kaufman found that jurors whose views on the appropriate penalty would be "fixed" upon hearing certain items of evidence should be "subject to challenge for cause under the *Witt* standard, and appropriate voir dire should be permitted to uncover such death penalty views." (*Ibid.*) The dissent found "little sense" in *Fields*'s footnote 13 to the extent the inquiry was focused on the charges listed in the information (*id.* at p. 648) and asserted that cases since *Fields* had not been so restrictive (*id.* at pp. 648-649).[67]

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67. *People v. Rich* (1988) 45 Cal.3d 1036, cited by the *Clark* dissent, stands for the proposition "voir dire may not be used to 'to educate the jury panel to the particular facts of the case, ...' " (At p. 1105 .)

In *People v. Coleman* (1988) 46 Cal.3d 749, cited by the *Clark* dissent, this Court found prospective juror Low excusable based upon his "unequivocal statement that he would always vote for the death penalty in a case of premeditated murder." (At p. 767.) The *Clark* dissent was not certain whether premeditation was charged. (*Clark, supra*, 50 Cal.3d 583, 649 (dis. opn. of Kaufman, J.).)

Finally, the *Clark* dissent's citation to *People v. Johnson* (1989) 47 Cal.3d 1194 simply does not direct the reader to a discussion of what standard should apply to *for-cause* voir dire on the question of penalty. (Compare *Clark,*

However, less than one month later, this Court seemingly overlooked footnote 13 in *Fields*. At footnote 8 on page 847 in *People v. Mattson* (1990) 50 Cal.3d 826, this Court cited footnote *12* of *Fields*, which stated:

> The California decisions following *Witherspoon* have not discussed that doctrine in terms of the juror's ability to follow his oath and carry out the instructions of the court. We have, however, expressed our disapproval of the use of hypothetical cases to test a juror's views on capital punishment. (See *People v. Velasquez, supra*, 26 Cal.3d 425, 440, fn. 11; *People v. Vaughn, supra*, 71 Cal.2d 406, 413; *People v. O'Brien* (1969) 71 Cal.2d 394, 404-405 []; *People v. Risenhoover, supra*, 70 Cal.2d 39, 55-56.) The tenor of those decisions is that a juror's view of other cases is largely irrelevant to the *Witherspoon* standard because such views would not make it unmistakably clear whether the juror would automatically vote against death in the case to be tried. Thus, the California cases support the trial judge's ruling in the present case barring defense counsel from questioning the jurors about extreme or hypothetical cases.

(*Fields, supra*, 35 Cal.3d 329, 357, fn. 12.)

The *Mattson* Court's citation to the above language was ambiguous as to whether the *Mattson* Court thought *Fields* had left open the possibility that case-specific bias could be established by a juror's reaction to potential *evidence* (as opposed to the juror's unwillingness to accept that a conviction for capital murder was the starting point for penalty determination). (See *People v. Mattson, supra*, 50 Cal.3d 826, 847, fn. 8 ["We need not decide here whether there must be reason to believe that the circumstance in which a juror would consider imposition of the death penalty may be present in the case to be tried before him. (See *People v. Fields, supra*, 35 Cal.3d 329, 357, fn. 12.)"].) It appears the *Mattson* opinion overlooked that this possibility had not been left open in *Fields*. (See *Fields, supra*, 35 Cal.3d 329, 358, fn. 13 ["If a

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supra, 50 Cal.3d 583, 649, citing *People v. Johnson, supra*, at pp. 1224-1225 [discussion of proper voir dire for peremptory challenge], with *People v. Johnson, supra*, at pp. 1223-1224 [discussion of proper standard for death penalty of for-cause excusal of jurors].)

prospective juror has been informed of the *evidence* to be presented, his asserted automatic vote may be based upon this information, in which case exclusion of the juror because of his views on the death penalty would violate *Witherspoon*."].)

Next, the opinion in *People v. Pinholster* (1992) 1 Cal.4th 865 ("*Pinholster*") applied the *Fields* standard, explaining that it required a distinction between, on one hand, a juror's attitude toward ordinary facts and, on the other hand, those matters which actually amounted to the *statutory* criteria establishing death eligibility in the case. Defendant Pinholster complained on appeal that for-cause voir dire had included factual hypotheticals. (*Pinholster, supra*, 1 Cal.4th 865, 917.) Citing *Clark, supra,* the Court in *Pinholster* acknowledged that "questions directed to jurors' attitudes towards the particular facts of the case are not relevant to the death-qualification process, ..." (*Pinholster, supra*, at p. 917.) However, citing to *Fields, supra*, inter alia, the Court in *Pinholster* explained that, even if the fact-based voir dire was "error," it was not "prejudicial" because the voir dire had served the purpose of discerning whether jurors could *ever* vote for the death penalty under a category of death eligibility set forth by the Legislature, i.e., "burglary-murder." (*Id.* at pp. 917-918.)

The record showed that excused prospective juror Rohletter could not accept the concept of death eligibility based on the statutory criteria of felony-murder. (*Pinholster, supra*, 1 Cal.4th 865, 917 ["His position was an abstract one regarding the felony-murder special circumstance, not a matter of evaluating the particular facts of this case."].) Excused prospective juror Barsugli likewise could not accept the concept of death eligibility based on the statutory criteria. Barsugli could not even begin to consider the possibility of death as a penalty because the statutory criteria did not require proof of premeditation. (*Ibid.*) The opinion in *Pinholster* observed that the fact-based

voir dire had actually revealed "an abstract inability to impose the death penalty in a felony-murder case." (*Id.* at p. 916; *id.* at p. 918 ["This was not a case like *Clark, supra*, 50 Cal.3d at page 597, where the questions about juror attitude toward evidence of the victims' burns were more appropriate to general voir dire. Rather, the questions regarding the facts of the particular case led to *crucial* questions and answers about the jurors' attitudes in the *abstract*." (emphasis added)].)

A short time later that same year, the United States Supreme Court would confirm that the proper standard was the abstract one, i.e., that a juror's bias implies a determination to vote only one way as soon as there has been "conviction of a capital offense."[68] (*Morgan v. Illinois* (1992) 504 U.S. 719, 735.) The juror's duty, the Court explained, was to accept the abstract proposition that "a lesser sentence is available in every case where mitigating evidence exists; . . ." (*Id.* at p. 738.) Thus, a sentencer who would invariably vote one way once the statutory death-eligibility criteria were present could not make a penalty selection with a "basis in the evidence developed at trial." (*Id.* at pp. 738-839.) A right to voir dire was necessary to uncover this form of bias. (*Id.* at p. 739.)

Thereafter, the opinion in *People v. Visciotti* (1992) 2 Cal.4th 1 ("*Visciotti*") addressed the excusal of a juror who simply could *never* vote for the penalty of death, in *any* case, despite the fact he had no disagreement with the concept of capital punishment. (*Visciotti, supra*, 2 Cal.4th 1, 44-45.) This Court understandably held the excusal was proper. (*Id.* at p. 46.) However, the *Visciotti* opinion, in a footnote, also made a passing reference to *Fields*, stating:

> The question to be resolved under *Witherspoon* and its progeny is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the

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68. Which, in California, means conviction of first degree murder *plus* a true finding on at least one special circumstance. (§ 190.2(a).)

> juror. The impact the juror's views might have in actual or hypothetical cases that are not before the juror are irrelevant to that determination. (*People v. Fields* (1983) 35 Cal.3d 329, 357 [].)

(*Visciotti, supra*, 2 Cal.4th 1, 45, fn. 16.)

The reference was a curious one, given that the standard of *case-specific* bias developed in *Fields* (when discussing excused juror Harris) was not implicated. It is true that the reference was not completely inaccurate; the *Fields* opinion had also applied (implicitly) the standard of universal bias by (implicitly) approving the excusal of a juror who would not vote for the death penalty under any circumstances. (See *Fields, supra*, 35 Cal.3d 329, 356 & 358, fn. 13.) And, indeed, a juror who has universal bias certainly could not consider the appropriateness of a penalty in "the case before him," because that juror cannot consider the penalty in *any* case. However, the reference to *Fields* was potentially misleading, because it did not identify the actual *standard* set forth in *Fields* for evaluating *case-specific* bias, and thus could lead a casual reader not to recognize the cited language from *Fields* was actually authority for the narrower standard.

Still, *Fields* and *Pinholster* were correctly applied in *People v. Livaditis* (1992) 2 Cal.4th 759 ("*Livaditis*"). Defendant Livaditis's case involved, inter alia, his convictions for three counts of first degree murder (§ 189) and special circumstances of felony-murder (§ 190.2(a)(17)) and multiple *current* murders (§ 190.2(a)(3)). (*Livaditis, supra*, 2 Cal.4th 759, 766.) By statute, even in the absence of any other criteria, the penalty of death had to be considered. However, the excused prospective juror in *Livaditis* could not accept the concept of death eligibility based on statutory criteria which did not require proof of a *prior* murder. (*Livaditis, supra*, 2 Cal.4th 759, 772.) In other words, like prospective juror Barsugli in *Pinholster*, there was a refusal to accept the law by *considering* the penalty of death once the statutory criteria were present.

In evaluating the defendant's challenge to the juror's excusal, the *Livaditis* opinion quoted the phrase "in the case before him" from *Fields*. (*Livaditis, supra*, 2 Cal.4th 759, 772.) That indicated the *Livaditis* opinion meant to apply the same standard for case-specific bias found in *Fields*. That indication was confirmed because the *Livaditis* opinion also cited *Pinholster* for the proposition that a "trial court properly excused a prospective juror who indicated an inability to consider the death penalty in a burglary-murder case, even though juror could consider it in other situations." (*Livaditis, supra*, at pp. 772-773.) Again, the *Fields* standard was confirmed.

There was another curiosity which followed. As stated above, the *Visciotti* opinion curiously, and with a potential for confusion, cited to the *Fields* language regarding case-specific bias, despite the fact *Visciotti* only addressed the excusal of a juror whose bias was *not* case-specific. After *Livaditis,* this curious and potentially misleading practice was repeated. In *People v. Hill* (1992) 3 Cal.4th 959 ("*Hill*"), three prospective jurors were excused for cause based on their inability to consider the penalty of death. (*Id.* at pp. 1003-1005.) In resolving the challenge to these excusals, the *Hill* opinion cited to the above footnote in *Livaditis,* for the following proposition:

> More specifically, the determinant is "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.*" (*People v. Visciotti, supra*, 2 Cal.4th 1, 45, fn. 16, italics added.)

(*Hill, supra*, 3 Cal.4th 959, 1003.)

But, the factual discussion in the *Hill* opinion gave little basis to infer that any one of the excused jurors could have ever voted for the penalty of death in *any* case. (See *Hill, supra*, 3 Cal.4th 959, 1003-1005.)[69/] Moreover,

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69. In fact, juror Kreisler was *jointly* excused by the parties. (*Hill, supra*, 3 Cal.4th 959, 1003.) Although the opinion noted the necessary preclusion of the appellate claim that the exclusion was erroneous, the opinion

omitted from *Hill* (and omitted from *Visciotti*, which *Hill* cited) was any reference to the *Fields* opinion's *articulation* of what was meant by "the case" before the juror, i.e., that *Fields* excluded, from "the case," the *evidence* to be introduced in the penalty phase. As with the *Visciotti* opinion, the reference was curious and potentially misleading, but no harm was immediately apparent.

e. Summary

As the foregoing discussion reveals, up to this point, this Court recognized that the standard for determining case-specific bias was based on the recognition, in *Fields,* that "the case" to which a prospective juror is to have an open mind is the case which is created by the determination of death *eligibility.* That is to say, at the point when the defendant merely stands convicted of capital murder, such that he is merely *eligible* for death or life, the Legislature declares that the appropriate penalty to be *selected* must be, as a matter of law, yet unknown.

This standard of case-specific bias is thus clear and workable. If a juror will have substantial difficulty accepting the legal concept that the statutory death-eligibility criteria are themselves sufficient to *require* consideration of a penalty of death the juror is biased and must be excused. Conversely, if a juror will have substantial difficulty accepting the legal concept that the presence of the statutory death-eligibility criteria do not *compel* a vote for death, and thus that the law still requires consideration of a penalty of life, that juror is also biased and must be excused.

Of constitutional necessity, this *Fields* standard of case-specific bias excludes evaluation of whether the juror during the penalty phase might resolve the question of penalty based on overwhelming reliance on some particular fact later proven by the penalty phase evidence. This *Fields* standard comports with

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considered the basis for Kreisler's excusal nonetheless. (*Id.* at pp. 1003-1004.)

Witt and *Morgan v. Illinois* by ensuring bias *will* be found when, without knowledge of the evidence to be presented at the selection phase, the juror's penalty vote is already determined by the conviction for capital murder.

The *Fields* standard likewise comports with these authorities by ensuring the juror will *not* be excused as biased because a party has confronted the juror with an offer of proof of some or all the aggravating evidence expected in the penalty phase, and the juror is able to predict how the juror would likely vote if that offer of proof turns out to be accurate. Excusal of the juror for that reason would violate *Witt* because the juror's prediction would in reality be based on knowledge of some of the expected penalty-phase evidence, and the juror likely would have involuntarily engaged in some tentative *weighing* of that evidence against whatever offer of proof (if any) there was regarding the expected evidence in mitigation. This was the state of the law in 1992.

However, about two years later, and then eight years after that, this Court would abruptly and perhaps inadvertently distort the *Fields* standard, applying instead an unworkable and unconstitutional standard – which ultimately resulted in this Court's reversal of the death judgment in *People v. Cash* (2002) 28 Cal.4th 703 ("*Cash*").

2. Departure From The *Fields* Standard

a. *People v. Kirkpatrick*

The problem started with the opinion in *People v. Kirkpatrick* (1994) 7 Cal.4th 988 ("*Kirkpatrick*"). During death-qualification voir dire in *Kirkpatrick*, the trial judge made three rulings. First, the judge refused the People's request to limit inquiry to "the prospective jurors' views on the death penalty in general or as a punishment for the offenses and special circumstances charged in the information." (*Kirkpatrick, supra*, 7 Cal.4th 988, 1004.)

Second, the judge "agreed" with defendant Kirkpatrick when he requested

> that the parties should be permitted to ask prospective jurors whether they would always or never vote for the death penalty in cases involving any *generalized facts*, whether *pleaded or not*, that were likely to be shown by the *evidence* at trial.

(*Ibid.*, emphasis added.)

Finally, the judge ruled that "voir dire on unpleaded facts could be used only to assist the parties in exercising peremptory challenges and not to establish grounds for disqualification." (*Ibid.*)

The *Kirkpatrick* opinion held:

> The latter aspect of the court's ruling was incorrect. Although the death penalty voir dire "seeks to determine only the views of the prospective jurors about capital punishment in the abstract" (*People v. Clark* (1990) 50 Cal.3d 583, 597 []), a challenge for cause should be sustained as to any prospective juror whose views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the court's instructions and the juror's oath (*Wainright v. Witt* (1985) 469 U.S. 412, 424 []). A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document. (See, e.g., *People v. Livaditis* (1992) 2 Cal.4th 759, 772-773 []; *People v. Pinholster* (1992) 1 Cal.4th 865, 917-918 [].)

(*Kirkpatrick, supra*, 7 Cal.4th 988, 1004-1005.)

This single passage misconstrued the law gravely and it distorted the *Fields* standard.

As discussed above, this Court's opinion in *Clark* was *express* and *specific* on the point that the parties had no right whatsoever to voir dire any juror regarding "the specifics of the case" or the juror's "attitudes toward evidence that was to be introduced in . . . trial." (*Clark, supra*, 50 Cal.3d 583,

597.) The *Clark* opinion specifically referenced the *Fields* standard for the proposition that it was flatly forbidden that a juror should be excused for cause "because he would vote against the death penalty based on *evidence to be presented.*" (*Clark, supra*, 50 Cal.3d 583, 597, fn. 4, emphasis added, citing *Fields, supra*, 35 Cal.3d 329, 358, fn. 13.) Thus, the ending part of the above passage in *Kirkpatrick* is not consistent with or an extension of *Clark*; rather, it directly contradicts the settled rule *Clark*.

By citing *Clark* with apparent approval, while in the same paragraph stating a proposition directly contrary to *Clark*, the *Kirkpatrick* opinion created the false impression that its ruling was consistent with *Clark*. *Clark* does not support *Kirkpatrick*, and necessarily the soundness of the evidence-specific bias proposition advanced in *Kirkpatrick* is dependent upon (1) whether there is some other support in law or logic to be found for the proposition of evidence-specific bias, and (2) whether such other support can overcome the law and logic established by *Fields* and its progeny – including *Clark* itself.

But, there is no such support to be found. The *Kirkpatrick* opinion cites *Witt* (*Kirkpatrick, supra*, 7 Cal.4th 988, 1005), but only for the very general proposition that a juror's views on capital punishment amount to bias when those views "would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the court's instructions and the juror's oath." That merely begs the question of *what is* a juror's duty, and that question has been answered by *Fields* and its progeny. *Fields*, and the cases citing *Fields*, made plain that a juror's *duty* is merely not to be committed to one penalty merely because the statutory death-eligibility criteria have been established – i.e., when all that has been established is *guilt* of capital murder. In contrast, under the *Fields* standard a juror cannot be considered to have a *duty* to remain unaffected and uncommitted once the juror is given some offer of proof regarding the very evidence from which 12 jurors later *must* commit

to a penalty.[70] (*Fields, supra*, 35 Cal.3d 329, 356-357 & 358, fn. 13; accord *Clark, supra*, 50 Cal.3d 583, 597 & fn. 4.) Thus, the *Kirkpatrick* opinion's citation to *Witt* provides no support for the principle of evidence-specific bias asserted in *Kirkpatrick*.

Finally, the *Kirkpatrick* opinion cites, as a "See, e.g.," to *Livaditis* and *Pinholster* for the following, critical – law-revising – point:

> A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document.

(*Kirkpatrick, supra*, 7 Cal.4th 988, 1005.)

The citation to *Pinholster* is misleading, for *Pinholster* could scarcely be more specifically contrary to the *Kirkpatrick* proposition that a party should be entitled to voir dire the jurors by testing their reactions to the penalty phase evidence. As already stated, the opinion in *Pinholster* acknowledged there was reason to consider it *error* to allow fact-based voir dire; the only reason such voir dire was not prejudicial was that it happened to reveal the excused jurors' attitude toward the *charged* elements which established the defendant's guilt of capital murder. (*Pinholster, supra*, 1 Cal.4th 865, 916 [voir dire revealed "an abstract inability to impose the death penalty in a *felony-murder* case" (emphasis added)], 917 ["His position was an abstract one regarding the *felony-murder special circumstance*, not a matter of evaluating the *particular facts of this case*." (emphasis added)].) Thus, the above passage in *Kirkpatrick* is not consistent with or an extension of *Pinholster*; rather, it is directly contrary to the settled rule in *Pinholster*.

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70. Of course, those 12 jurors need not commit to the same penalty.

By citing *Pinholster* with apparent approval, while in the same paragraph stating a proposition directly contrary to *Pinholster*, the *Kirkpatrick* opinion created, a second time, the false impression that its ruling was consistent with prior decisional law. Worse, the suggestion was that *Pinholster* affirmatively supported the *Kirkpatrick* proposition, when in fact it was *directly* to the contrary.

That leaves the *Kirkpatrick* opinion's citation to *Livaditis*. But that, too, affirmatively demonstrates the wrongness of *Kirkpatrick*. Just as in *Pinholster*, the juror excused in *Livaditis* was biased against the *charged* statutory death-eligibility criterion. That juror refused to accept the legal principle that there could be death *eligibility* based on a law which allowed such eligibility in the absence of a prior murder. (*Livaditis, supra*, 2 Cal.4th 759, 772.) Thus, (1) *Livaditis* did *not* involve a *generalized* fact or circumstance, (2) the challenged matter in *Livaditis* (the special circumstances, of which prior murder was not a legal element) was in fact *charged* in *Livaditis*, and (3) the voir dire in *Livaditis* did *not* involve questioning the juror regarding the *evidence* – or any part of it – which would be the basis for decision in the penalty *selection* phase. Thus, in a familiar theme, the above passage in *Kirkpatrick* is not consistent with or an extension of *Livaditis*; rather, it is an attack on the rule stated in *Livaditis*.

By citing *Livaditis* with apparent approval, while in the same paragraph stating a proposition directly contrary to *Livaditis*, the *Kirkpatrick* opinion created, a third time, the false impression that its ruling was consistent with prior decisional law. Worse, it was a second suggestion that prior law affirmatively supported the *Kirkpatrick* proposition, when in fact *Livaditis*, too, it was *directly* to the contrary.

There was no law to support *Kirkpatrick*. To the contrary, all law was against *Kirkpatrick*, and nothing in *Kirkpatrick* offered, or even pretended to

offer, an independent logical basis for its proposition. *Kirkpatrick* was wrong, clearly, positively, and unmistakably.

b. Post-*Kirkpatrick* Cases

Perhaps no case promptly scrutinized the failings in *Kirkpatrick* because no damage was immediately inflicted in the form of an adverse result in the cases presented. The erroneous statement of law had no impact in *Kirkpatrick* itself, because the opinion found the "error" to be harmless. (*Kirkpatrick, supra*, 7 Cal.4th 988, 1005.) The opinion which followed in *People v. Davenport* (1995) 11 Cal.4th 1171, quoted *Kirkpatrick* without analysis, but ultimately found no prejudicial *Kirkpatrick* error. (11 Cal.4th 1171, 1203-1204.)[71] Likewise, the opinion in *People v. Ervin* (2000) 22 Cal.4th 48, mentioned *Kirkpatrick*, but ultimately found dispositive the test set forth in *Pinholster* (i.e., the *Fields* test), because the excused jurors simply were not able to accept felony-murder as a basis for death eligibility. (22 Cal.4th 48, 69-71.)[72]

The opinion in *People v. Cunningham* (2001) 25 Cal.4th 926, made reference to *Kirkpatrick*, but only to reference *Kirkpatrick*'s conclusion that a full opportunity for general voir dire would be adequate to explore the facts of the case. Inferentially, the suggestion was that it is never too late to make a

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71. One Justice did recognize something was amiss. The concurring opinion in *People v. Ramos* (1997) 15 Cal.4th 1133, found no constitutional basis whatsoever for the notion of *Kirkpatrick* error, finding only that, "The error, if such it be, is a violation solely of California decisional law." (15 Cal.4th 1133, 1185 (conc. opn. of Mosk, J.).)

72. Although not mentioned as a point of analysis in *Ervin*, the *Fields* analysis in *Pinholster* would also demonstrate the jurors were excusable because of an inability to accept the Legislature's determination that the hirer must be considered *eligible* for death *consideration*, even if he was not the actual killer.

challenge for cause when actual bias manifests itself. (25 Cal.4th 926, 974-975.) Finally, in a fashion similar to that in *People v. Ervin, supra*, the opinion in *People v. Ochoa* (2001) 26 Cal.4th 398, referenced *Kirkpatrick*, but thereafter relied on *Pinholster*'s analysis because, again, excused jurors were unable to accept the statutory death-eligibility criteria as an acceptable basis even to commence consideration of death as a possible penalty. (26 Cal.4th 398, 428-432.)

Thus, up to this point, prior to *Cash, supra*, the notion of *Kirkpatrick* error – as utterly wrong as it was – had inflicted no harm.

c. *Cash*

However, *Kirkpatrick*'s wrongful revision of the law became harmful in 2002.

Just about eight years prior to his latest murder (this one in the course of robbery), defendant Cash at age 17 murdered his elderly grandparents. (*Cash, supra,* 28 Cal.4th 703, 714, 717.) The trial judge refused to permit Cash to voir dire jurors during death-qualification (or later) regarding the hypothetical fact of a"prior murder." (*Id.* at pp. 719, 722.) This Court found *Kirkpatrick* error, stating:

> . . . in this case defendant's guilt of a prior murder (specifically, the prior murders of his grandparents) was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances, ...

(*Cash, supra*, 28 Cal.4th 703, 721.)

Expressly because defendant Cash ultimately could not get a pre-trial preview of how jurors during the penalty-phase might react to the *uncharged* fact of his prior murders, this Court reversed the judgment of death which those jurors had authorized by their verdict. This Court asserted Cash had a constitutional right to ascertain – on the ground that it would be *cause* for

excusal – whether a juror would find such prior commission of murder overwhelmingly dispositive in support of a conclusion that Cash should be executed. (28 Cal.4th 703, 722-723.) The justification for this asserted constitutional standard of case-specific bias was (1) a citation to *Kirkpatrick* for the *evidence*-specific standard which that case for the first time created; (2) citations to later cases which themselves cited *Kirkpatrick* without probing the case; (3) citations to the pre-*Kirkpatrick* cases of *Pinholster* and *Livaditis*; and (4) a "see" citation to *Morgan v. Illinois, supra*. (28 Cal.4th 703, 721, 723.)

Cash's citations were on par with *Kirkpatrick*'s. First, for the reasons previously stated, *Kirkpatrick* was utterly and unmistakably incorrect; thus, *Cash* is wrong to the extent it relies on *Kirkpatrick*. Second, the other cases citing to *Kirkpatrick* are just as wrong for the same reason that *Cash*'s reliance on *Kirkpatrick* is wrong. Third, for the reasons that *Kirkpatrick* tended to distort the holdings in *Pinholster* and *Livaditis*, such repeated citation in *Cash* became serially distortive and the effect of such citation has become harmful.

Finally, the citation to *Morgan v. Illinois* is counter to the evidence-specific bias theory advanced in *Cash* (and *Kirkpatrick*). As previously stated, the holding of *Morgan v. Illinois* was that a juror is biased if he is fixed upon *selection* of a particular penalty based solely on the fact the defendant is *eligible* for the penalty, i.e., a bias based on the *statutory charges* which make the defendant guilty of capital murder. (*Morgan v. Illinois, supra*, 504 U.S. 719, 721 ["We decide here, whether, during *voir dire* . . . a state trial court may, . . . refuse inquiry whether a potential juror would automatically impose the death penalty *upon conviction* of the defendant." (emphasis added)], 723 [defendant's counsel sought to ask, " 'If you found [defendant] *guilty*, would you automatically vote to impose the death penalty *no matter what the facts are*?' " (emphasis added)], 733 ["We deal here with . . . jurors who would unwaveringly impose death *after a finding of guilt*." (emphasis added); ". . .

jurors who would *always* impose death following conviction, . . ." (original emphasis)].)

3. Rejection Of *Kirkpatrick* And *Cash*

There is nothing to be done at this point about the erroneously-reversed death judgment in *Cash*; however, this Court properly should overrule *Cash* and *Kirkpatrick* and end the erroneous theory of *Kirkpatrick* error.

As has been shown in the discussion above, the standard of case-specific bias set forth in *Kirkpatrick* has no basis in the law. It is *directly* contrary to the logical, correct, and constitutionally fine-tuned standard set forth in *Fields* and the cases which have cited *Fields* – including *three* of the cases actually cited in *Kirkpatrick*. Further, the *Kirkpatrick* rule threatens to result in unconstitutional excusals.

Unlike the *Kirkpatrick* rule, the standard set forth in *Fields* ensures that an assertedly "automatic" vote for death (or life) is not actually the result of a prospective juror being forced involuntarily to engage in tentative assessment of the evidence which will be presented at the penalty selection phase. Under *Fields*, the juror's duty is only to accept the Legislature's command not to be committed to one penalty or the other once the defendant is found guilty of capital murder. That is to say, the juror must not preclude *consideration* of life just because the charge of first degree murder and special circumstance(s) have been proven, and the juror must not preclude *consideration* of death because of an unwillingness to accept the law which says those eligibility criteria are sufficient to expose the defendant to the possibility of death. As a practical matter, that is all that is fair.

By the same token, *Kirkpatrick* is unfair. To give a more or less accurate answer during *Cash/Kirkpatrick* voir dire, a prospective juror would have to be apprised of any "general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless

of the strength of the mitigating circumstances." (*Cash, supra*, 28 Cal.4th 703, 721.) There is no such fact or circumstance; rather, such voir dire will serve only to retain those already disposed to the defense or those whose powers of imagination do not falter under pressure.

For example, a prospective juror could be asked initially during voir dire whether he would vote for death if the evidence were to show the defendant personally killed 100 persons by serially locking each in a chamber so that each died of painful dehydration. A normal person might well be expected to say "yes," and that answer would not likely waver even if the follow-up question was generally phrased in terms that there would be some sort of unspecified mitigation. Rather, that person could be expected to answer honestly that, upon hearing of those 100 horrific murders, it would be impossible to imagine how any case in mitigation could make a difference.

However, one may posit that the prospective juror is then informed that the case in mitigation might be that the defendant, prior to the killing spree, had devoted his life to ending world hunger, that he had cured a type of cancer, and that once he even donated a kidney to the Pope. Upon the prospect presented even by that hypothetical, the same prospective juror would relent and affirm that, indeed, he could "keep an open mind." Upon reflection, it would be clear that the only failure was in the juror's imagination; unassisted, the juror could not contemplate that indeed a compelling mitigation case was possible. Such a juror would be ready to listen and determine whether the mitigation case actually presented was compelling. Further, a later death vote by that juror could not be in any way attributed to *bias* merely because the mitigating case *actually* presented did not even come close to outweighing the aggravating force of 100 horrible murders.

As this tends to show, there is no empirical basis for a judicial assumption that some facts are just so bad that they would cause an otherwise

impartial juror "invariably" to vote for the death penalty. (*Cash, supra*, 28 Cal.4th 703, 721.) Irrespective of however horrifying a case in aggravation may be, that horror can always be offset if the case in mitigation is sufficiently *compelling*. It is simply the case, however, that often the case in mitigation is not compelling.

Cash, which appears to be the sole case in which this Court has actually given shape to this concept by reversing a death judgment, presents a suitable example. As indicated above, the premise of *Cash* was that it was fair to expect some jurors, who are otherwise impartial, would be unable to listen to and consider the mitigating evidence once informed that Cash previously murdered his grandparents as a minor. (*Cash, supra*, 28 Cal.4th 703, 721.) But that premise was an assertion of fact which bespeaks a psychological assessment beyond the province of jurists.

The fact defendant Cash murdered his grandparents was decidedly horrible. But it makes no sense to say some juror could fairly be expected to *disregard* the strength of any case in mitigation, i.e., that such a juror would "invariably" vote for death simply upon hearing such evidence. Rather, *whatever* the case in mitigation, any juror would consider it and *weigh* the aggravation against mitigation. For example, it is difficult even to conceive of a juror who would not at least have *listened* to evidence that, in the interim between murdering his grandparents and his latest victim, Cash had raised millions for charity, rescued multiple drowning children, and saved puppies from burning buildings. And, no juror who was not already excludible for some other reason[73] would have refused to *consider* in his or her own mind whether such evidence actually made Cash less despicable. And, even then, that juror still could *choose* to rely on the prior murders, concluding that the

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73. E.g., a juror who would refuse to consider life imprisonment in *any* case of felony-murder.

moral aggravation attached to such murders ultimately outweighed everything else Cash had done.

In precisely the same manner, it is unfair even to speculate that any of the jurors who actually sat in judgment of Cash failed to hear and consider the effect of the case in mitigation. True, Cash's case in mitigation was not quite as impressive as the hypothetical one above. Cash presented evidence of hardship in early life, which did not prevent him from at one point being steadily employed, and then he got involved in narcotics; it was possible that he was depressed. (*Cash, supra*, 28 Cal.4th 703, 717-718.) Not particularly compelling, but that is no reason to think there was the slightest likelihood that any of the jurors did not *listen* to it and then internally *contemplate* whether such mitigation in fact outweighed the moral aggravation inherent in Cash's murder of his grandparents. The mere fact – if a fact it be – that many jurors, or perhaps most of them, would find after such weighing that the scales were not even close to tipping in appellant's favor is a reflection on the balance of deeds in Cash's life, not a reflection on the jurors whose task it was to engage in the balancing process.

This also is borne out by this Court's failing, in *Cash*, even to attempt a demonstration of what could have been meant by its vague statement that "the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance." (*Cash, supra*, 28 Cal.4th 703, 721.) To what end such probing? Merely asking jurors about a "prior murder" would not have given meaning to the possibility that a juror might attach great moral significance to the murder of one's *grandparents*. Thus, ultimately something close to the actual facts would have had to be posited to the jurors.

Further, even then a juror who acknowledged candidly that his penalty vote was likely a foregone conclusion would only be giving voice to the fact he was at that time unable to *imagine* a case in mitigation sufficient to balance the

aggravating fact of such prior murders. That would not be any indication, at all, that the juror was unwilling to *listen* to such mitigation evidence as Cash would introduce so as to see if in fact there was some weighty case in mitigation which simply had escaped the juror's imagination.

To shed more light, one need only reverse the situation. It is conceivable that a defendant could have a most compelling mitigation case. The defendant might have personally saved 100 soldiers during Viet Nam. If a prosecutor informed prospective jurors of that case in mitigation, it is likely many or most would honestly state they could not imagine sentencing such a defendant to death despite his present felony-murder. If such jurors candidly indicated that the moral greatness of saving the lives of so many would make it close to impossible to vote for guilt, no one could rationally suggest that those jurors would be excusable. It would be up to the prosecution simply to try to *counter* that mitigation with evidence in aggravation.

That would be possible in theory. It would be a close case in the penalty phase if the prosecutor produced evidence showing the defendant also raped, flayed alive, and then buried alive several children. Upon such news, those same jurors likely would find that in fact their minds were not as "made up" as they had thought, and it would be clear that their prior opinion was quite tentative.

Again, this reveals that a juror's power of imagination is all that a juror can rely on in answering a voir dire query whether hearing certain evidence (whether in aggravation or mitigation) would cause them "invariably" to vote one way or the other. In fact, there is simply no empirical basis for a conclusion that in the world of otherwise impartial jurors, there is a subclass of any size which includes jurors who simply would *not listen* to the mitigation evidence merely because the case in aggravation is substantial, or even spectacular. Likewise, such jurors would not be able to avoid *considering* such evidence,

because each would ultimately have to vote on the penalty, and the conscience of each would necessarily take into account all that was presented. Any one of them, or even all of them, might still find the prior murders of one's grandparents simply not outweighed by a multitude of good deeds. However, that would reflect not bias but rather an assessment of the balance of considerations regarding a individual defendant's life.

The erroneous creation of a standard of evidence-specific bias in *Kirkpatrick*, now given tangible effect in *Cash*, has created mischief via a mere *declaration* that, as a matter of law, there are some facts which are so damning that they "could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances." (*Cash, supra*, 28 Cal.4th 703, 721.) One would not accuse a judge of such frailty of mind, and it is insulting to jurors to condone a rule based on the premise their frailty is presumptively greater. (Cf. *People v. Guiton* (1993) 4 Cal.4th 1116, 1131 ["The jury was as well equipped as any court to analyze the evidence and to reach a rational conclusion."].)

The *Cash* declaration improperly fails to recognize that a case in aggravation is never so overwhelming that jurors must be presumed unable to listen to and give effect (which may simply be de minimis in comparison) to the evidence in mitigation. All that *Cash*'s pronouncement accomplishes is to permit a defendant to inform a prospective juror of the most damning aspects of the case in aggravation, and then ask whether the juror could "keep an open mind." Jurors who are presented with a preview of a truly impressive case in aggravation during voir dire will frequently have no choice, when asked if they can keep an "open mind" to some unspecified (or simply unpersuasive) evidence in mitigation, but honestly to answer "no" – based on the simple fact they are unable unassisted to imagine a case in mitigation sufficiently compelling to overcome such aggravation. In fact, it may be that no such case

would exist except in the mind of one who simply is strongly opposed to the death penalty.

Moreover, the standard is itself unworkable. True, one juror might find a prior murder particularly impressive, but another might focus on the fact – discovered by the prosecution and promptly disclosed to the defense only well into the guilt phase – that the victim was the sole visitor to a group of elderly cancer patients, all of whom wish to testify in the penalty phase. If *Cash* and *Kirkpatrick* truly are correct, then the defendant in that case should be able to re-open voir dire, because assuredly some juror might find this aggravation as powerful in impact as two murders committed by one who was a minor. Perhaps another juror will realize that one of a defendant's prior street brawl happened on a holy day, and consider that affront to a particular deity to be as bad as two prior murders. Perhaps the mother of the murdered victim will reveal how the victim had an incredibly high I.Q. with a penchant for helping sick children – surely the victim might have been a pediatrician in the making, who would have saved countless lives of children who would have lived longer lives than the somewhat elderly grandparents of a 17-year-old.

Any of these facts could, in some reasonable juror's mind, be just as damning as a 17-year-old's murder of his grandparents. Under *Cash*, it would be constitutional error not to allow voir dire on such facts, because a juror "could" have as extreme a reaction as to any such fact as another juror could have to two prior murders. And, because in the absence of voir dire it could not be known whether such "bias" was present (see *Cash, supra*, 28 Cal.4th 703, 723), either a trial judge would have to re-open voir dire every time a fact was revealed which "could" have such an effect on "some jurors" (*Cash, supra*, at p. 721),[74] or there would be no judgment of death that can stand the test of

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74. And every trial attorney will be accused of ineffectiveness for failing to seek re-opening based on every fact which in appellate counsel's imagination

appeal. That is absurd.

The proper constitutional standard for evaluating case-specific juror bias is that of *Fields* and its progeny, which are contrary to *Kirkpatrick* and *Cash*. Respondent therefore respectfully submits *Kirkpatrick* and *Cash* may not constitutionally be given effect, but rather those cases must be rejected and overruled.

B. The Death-Penalty Qualification In This Case

With these points in mind, it is not difficult to dispose of appellant's challenges to the death-penalty qualification below.

1. Excusal Of Prospective Juror G. For Cause

Prospective juror G. was excused for cause over objection by appellant. (45 RT 19612-14.) Under questioning, Ms. G. revealed she "was quivering inside" even while contemplating a written question asking if she could vote for the death penalty in a criminal case, and she said, "I – I – I don't really think I could." (45 RT 19598.) She replied, "I – I am doubtful," when asked if she could actually ever return a vote for death. (45 RT 19599.) Even though Ms. G. thought certain crimes warranted the penalty of death (45 RT 19599), and she intellectually "like[d] to think {she] could consider it" because it would "sound[] very closed minded to say I can't consider something" (45 RT 19600), the fact was she just "d[id]n't know" whether she could (45 RT 19601). She was "not saying that [she] d[id]n't believe in capital punishment, if that's what" she was being asked. (45 RT 19612.) But, if in fact the question was instead whether she could "really consider and impose the death penalty in an appropriate case," even on the assumption that she "f[ou]nd that this [is] an appropriate case to impose the death penalty," the answer was, "I don't know.

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might cause such a reaction in some conceivable juror.

I would find it extremely difficult to." (45 RT 19609.)

The trial judge had a fair basis to infer Ms. G. would have substantial difficulty ever truly considering personally voting to impose the penalty of death. That was sufficient to permit her excusal. (*Visciotti, supra*, 2 Cal.4th 1, 45.)

2. Excusal Of Prospective Juror C. For Cause

Prospective juror C. was excused for cause over objection by appellant. (45 RT 19662-65.) Ms. C. had no problem with the penalty of death being inflicted (45 RT 19648), but she was not going to be part of the machinery. Rather, "it would be hard for [her] to do," and "it would bother [her] to decide." (45 RT 19648.) She "d[id]n't think [she] could" actually "make that kind of decision," and she would indeed "hate to be the one who makes the decision." (45 RT 19650.)

Ms. C. was asked point-blank, "Do you think you could set aside your feelings about not wanting to be on a jury that has as its task to determine punishment?" and "Do you think that you could set aside your feeling about not wanting to be on the jury and listen to the evidence and follow the judge['s] [] instructions?" (45 RT 19660.) She replied, "I don't know," and she stated, "I do have reservations" about whether she had the ability to do that. (45 RT 19661.) She candidly admitted she even "might" go ahead and "vote for a life sentence just because [she] d[id]n't want to face the tough decision of deciding the death penalty and voting for the death penalty[.]" (45 RT 19662.)

No rational person could have concluded the Ms. C. could be "trusted" to follow the statutory scheme (*Witt, supra*, 469 U.S. 412, 419; see *id.* at pp. 425-426); her excusal was compulsory.

3. Limitation Of Voir Dire

The trial judge refused to allow appellant to voir dire the jurors, for the purpose of for cause challenges, regarding appellant's "history of some sexual crimes." (45 RT 19545.) The trial judge explained,

> Well, if there's something that really qualifies as specific bias, I would be interested in what it is. What qualifies as specific bias in this case other than piling up the aggravating factors and seeing if you can push the juror over the edge?

(45 RT 19557);

> . . . You don't get to present – preview for them all of the aggravating factors that are gonna come out in the case or likely to come out in the case, preview for them and get them to basically deal with those, address those, all in advance, and to preview the trial, preview the case.
> I – I just don't think that jury selection is the time to preview the case. We don't preview the case in a guilt trial. We don't give them all of the significant facts and determine if they've – if that would cause them to make up their mind one way or another. We don't do that.
> We give them general principles and – and we don't get them – them to preview the case. We don't require them to preview the case. And I think that's what you're expecting us to do in this proceeding. . . .
> And so to that extent, as I say, you have the 800-pound gorilla in this case. We've got six murders of women and we've got them – and we've got other sexual violence involved and all of that was charged. And so accordingly I'm not trying to sweep that under the rug, but I just don't believe that the process embodies the parading out and presentation, prejudging, preliminary review of all the possible aggravating or possible mitigating factors of the case and expecting jurors to then give us their responses. I don't see that that's appropriate. I don't think it's permissible.
> And if I'm wrong, of course, there is a clear remedy that will be available to Mr. Solomon should he be – should the jurors reach a unanimous verdict for sentence in this case.

(45 RT 19563-64).

The trial judge was not wrong. Under the standard of *Fields*, and the cases which have applied the *Fields* standard, the trial judge was absolutely correct to preclude voir dire which would preview the evidence, or any of it,

from which the jurors ultimately would have to make the normative selection of penalty. To the extent *Kirkpatrick* and *Cash*, and their mistaken progeny, support a contrary conclusion, they must be rejected and overruled.

For all these reasons, appellant's challenge to the death-qualification below must be rejected.

X.

APPELLANT'S CHALLENGE TO PHOTOGRAPHS MUST BE REJECTED

Appellant's challenge to certain photographs admitted during the penalty phase (AOB 373-386) is meritless. Appellant's apparent premise is that he is entitled to a penalty selection unaffected by the emotions of the jurors who are selecting that penalty. (AOB 374-381.) However, the jurors were instructed to factor, into penalty selection, "any sympathetic . . . aspect of the defendant's character or history" as well as the prospect of "mercy." (66 RT 26011.) Appellant offers no authority for a constitutional rule that jurors who are permitted to operate from sympathy may not be confronted with evidence which might tend to counter that sympathy by triggering antipathy.

In any event,

> . . . [A] court has *narrower* discretion under Evidence Code section 352 to *exclude* photographic evidence of the capital crimes from *the penalty trial* than from the guilt trial. This is so for two reasons. On the one hand, because the "circumstances of the [capital] crime" are a statutorily relevant factor in the normative decision whether death is the appropriate penalty (§ 190.3, factor (a)), the prosecution is entitled at the penalty phase to show such circumstances in a bad moral light, including their viciousness and brutality. On the other hand, because the defendant has already been found guilty of the capital crime, the potential for prejudice on the issue of guilt is not present. [Citation.]

(*People v. Anderson* (2001) 25 Cal.4th 543, 591-592, original.)

> [W]e have often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony.

(*People v. Wilson* (1992) 3 Cal.4th 926, 938, internal quotation marks omitted.)

As follows, there is no basis for appellant's argument.

A. Photographs Of Yolanda

People's Exhibits 16, 18, 20, 21, 22, and 23 are photographs of Yolanda's corpse. Exhibit 16 is quite dark from the lighting, but it shows Yolanda's left arm pulled under her back which is strongly indicative of the arm having been tugged that way after she was dead because the tugger needed access to that arm, or at least the wrist. One might be able to discern the face is swollen, but it would not be clear. Yolanda's upper body is clothed in a white, patterned garment somewhat more concealing than a halter top. (1 Exh.-ACT 114.) Exhibit 18 presents nothing different, other than a slightly lighter view. (1 Exh.-ACT 118.)

Exhibit 20 shows the body is nude from the vagina down. The body has been repositioned so that a semen stain is visible on the right thigh. The effect of decomposition is pronounced on the left lower arm, with the uppermost layer of skin visibly separating from the next layer. (1 Exh.-ACT 122.)

Exhibit 21 shows the nude lower body in the original position. The positioning supports the inference that Yolanda's ankles were bound, and that after her death the bindings were removed. (1 Exh.-ACT 124.)

With more clarity from the lighting, Exhibits 22 and 23 show that Yolanda's face is noticeably bloated from decomposition. Her head is turned toward the left and her eyes are closed. There is no expression. (1 Exh.-ACT 126, 128.)

None of the photographs are very gruesome. Each depicts death, which is typically unattractive. As indicated above, Exhibits 16, 18, and 22

demonstrate a basis for the jurors to infer appellant bound Yolanda and killed her in that condition. Exhibit 20 reflects a sexual aspect to appellant's encounter with Yolanda. Exhibits 22 and 23 further reflect that appellant waited several days before "discovering" Yolanda's body.

The photographs are relevant to demonstrate how Yolanda was killed, particularly that she was bound at the time and that the manner of killing was one in which there were no marks. The photographs are no more shocking than appellant's murder of Yolanda and the other murder victims by asphyxiation. (Cf. *People v. Griffin* (2004) 33 Cal.4th 536, 581.) They were illustrative in a way that oral testimony simply cannot be. (Cf. *People v. Heard* (2003) 31 Cal.4th 946, 972.) The court below had discretion to reject appellant's Evidence Code section 352 objection. (See 43 RT 18975-80.)

B. Photographs Of Angela

Exhibit 60 shows the rear view of Angela's body. The top of the photograph does not reflect the body above the shoulders, and the bottom truncates at the upper thigh. The body is nude below the waist, but clothed in a shirt and jacket above. Angela's wrists are bound behind her. What appears to be some organic fluid stains her buttocks and hands, and the plastic sheeting underneath. (1 Exh.-ACT 206.)

Appellant's objection was that this photograph was cumulative to another photograph depicting that Angela's wrists were bound. However, as was pointed out without disagreement, only Exhibit 60 was taken at the scene and showed the wrists as they were left by the killer. (43 RT 19019-21.)

Exhibit 69 appears in the appellate record not in the form that it was admitted at trial. The photograph in the appellate record is a somewhat disgusting view of Angela's head, with the presence of maggots. (1 Exh.-ACT 224.) However, the record shows the court ordered, "I'll let in the bottom portion and cut it off here somewhere near the ear, leave part of the ear in so

they will know where the ear is, but let's get rid of the eye hanging out, . . ." (43 RT 19024.)[75/] Thus, the photograph as depicted in Exhibit 69 was not admitted.

Ordered admitted was a portion of the photograph which showed Angela's neck. This was, in fact, "the best photograph that shows this area of the side of the neck" which provided some evidence of ligature strangulation. (43 RT 19014.)

Exhibit 70 likewise shows furrowing of the neck, tending to demonstrate ligature strangulation. (1 Exh.-ACT 228.)

Thus, Exhibit 60 demonstrated exactly how Angela's wrists were left bound, and Exhibits 69 and 70 are evidence suggesting death by asphyxiation. Further, any disgust is simply the result of the fact the killer left the body to decompose in the extremely hot environment of a basement in July in Sacramento. That actually reflected appellant's knowledge, which he had learned from the investigation of Yolanda's body the month before, that cause of death investigation can be frustrated by letting the body decompose to such a state.

C. Photographs Of Maria

Exhibit 111 shows a cloth-wrapped bundle in a hole, which bundle is dirty, and from which bundle a foot extrudes. (2 Exh.-ACT 328.) Exhibit 113 shows a close-up of the foot portion of the bundle after the bundle has been removed from the hole and placed on white sheeting. (2 Exh.-ACT 334.) Neither photograph is gruesome in any respect, except to the extent they are evidence that a body has been buried.

Exhibit 114 shows Maria's body after the cloth has been removed.

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75. As the prosecutor pointed out without disagreement, the extrusion at the eyelid was not the eye, but "purge coming from the nose." (43 RT 19024.)

Maria's wrists are bound very tightly under the back of her knees. The clothing on the body, like the skin, is dirty. Toward the top of the photograph Maria's head is visible and, in the prosecutor's words, "the features have, in essence, sort of melted" and "the features have really been obliterated so there is really nothing gruesome or gross about it" (43 RT 19029). (2 Exh.-ACT 336.)

Actually, there is some horror to Exhibit 114, but that horror does not come from the depiction of the face, which a normal juror could view quite clinically. The horror comes from the fact the picture depicts just how horrible the last moments of Maria's life were. Appellant bound Maria in a position which would be uncomfortable for an ordinary person within seconds, even if the person had consented to such binding and thus was not immediately straining against the thin and painful bindings on the wrist, attempting to compensate for the extremely uncomfortable forward bending of the back and the compression of the abdomen. In this position appellant bound Maria, and in this position Maria died, with any struggles only resulting in pain to her extremities as her legs flailed and her body shook as appellant cut off her air supply.

The picture truly is worth more than many words as a depiction of the nature of appellant, who was the intentional and serial architect of such horror.

D. Photograph Of Cherie

Exhibit 144 is a photograph of Cherie's body from upper torso to lower thigh. A pajama top is on the upper portion of the body, positioned high, and the body is otherwise nude. There is some unavoidable decomposition, but there is simply nothing disturbing about the photograph other than the fact it is known that Cherie's life was ended by murder and that appellant buried her in a back yard in that same condition. (2 Exh.-ACT 416.) Appellant's only objection was that certain "red spots" on the body "are characterized as blood" – a statement refuted immediately by the court and the prosecutor, and a

statement which appellant does not even renew on appeal. (43 RT 19038.) The complaint regarding this photograph is frivolous.

E. Photographs Of Sheila

Exhibits 168A, 224, and 225 are photographs of Sheila's extremely decomposed form. The body would be almost unrecognizable as human, given the level of decomposition, and a normal juror who was expecting to see dead bodies in a multiple-murder case typically could view such decomposition rather clinically. (See 2 Exh.-ACT 482; 3 Exh.-ACT 600, 602.)

What makes the photographs markedly disturbing is their probative value in depicting the severely uncomfortable position Sheila endured at appellant's hands before and during the time she struggled for life as appellant cut off her air supply. One cannot help but think of the fact appellant would later do the same thing to Maria, despite his observation of the horror endured by Sheila.

Likewise, these photographs, and the photographs of Maria, are directly relevant as demonstrating the truth of the descriptions of Darlene (62 RT 24767, 24771, 24777) and Connie (62 RT 24867-68) that appellant trussed them in the same way. Worse, the fact appellant put Darlene and Connie in such positions only magnified the horror as to Sheila, because appellant had reason to know – from his encounters with Darlene and Connie – how bad it would be for Sheila in the period before he killed her.

Words were inadequate, again. The photographs of Sheila were properly admitted. (See 43 RT 19042-45, 19053, 19055-56; 60 RT 24290.)

F. Photograph Of Sharon

There is little different to be said about Exhibit 298, the photograph which tends to demonstrate that appellant first bound Sharon's body by tying her wrists behind her and tying her legs together, at some point before he

jammed socks down her throat. (3 Exh.-ACT 754.) Such a cutting-off of the airway would have prompted Sharon to struggle violently to her death, her body using up whatever oxygen remained inside even more rapidly due to those struggles.

Appellant argues the photograph shows a decomposition which is "particularly revolting." (AOB 380-381.) Again, the revulsion comes from the story which is revealed about the horror of the suffering which appellant forced upon Sharon, and the nature of appellant thereby revealed.

There was no error in the admission of this evidence.[76]

XI.

APPELLANT'S REPETITION OF STANDARD CLAIMS SHOULD BE REJECTED

This Court has rejected the argument (AOB 387-422) that the People have any burden of proof beyond a reasonable doubt as to the propriety of the penalty of death (*People v. Stitely* (2005) 35 Cal.4th 514, 573, 574), and little would be added by further discussion of the point.

The same applies to appellant's argument (AOB 423-436) that the jurors were required to agree on the basis for the death judgment. (See *People v. Stitely, supra*, 35 Cal.4th 514, 573.)

The same applies to the argument (AOB 437-446) the penalty of death could not be determined based on previously unadjudicated criminal conduct. (See *People v. Navarette* (2003) 30 Cal.4th 458, 522.)

The same applies to the argument (AOB 447-451) the jury was required

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76. Appellant argues his constitutional rights were violated by this admission. (AOB 374.) Reversal is completely precluded by appellant's lack of objection (Evid. Code, § 353; *People v. Heard, supra*, 31 Cal.4th 946, 972, fn. 12), but there is no objection if this Court observes the lack of merit in the claims.

to make a written statement of findings or reasons for returning a verdict of death. (*People v. Stitely, supra*, 35 Cal.4th 514, 574.)

The same applies to the argument (AOB 452-456) that intercase proportionality is required. (*People v. Stitely, supra*, 35 Cal.4th 514, 574.)

This Court has rejected the argument (AOB 457-461) that the death-penalty statutes fail genuinely to narrow the class of murderers to a subclass which is eligible for the penalty of death (*People v. Stitely, supra*, 35 Cal.4th 514, 573), and it might be mentioned that the resulting narrow*ed* subclass need not be itself narrow, but may instead be "broad" (*Creech, supra*, 507 U.S. 463, 475 [resulting subclass constitutional even though "defined broadly" and is resultingly "sizable"]).

This Court has rejected the argument (AOB 462-465) that equal protection demands a penalty phase to have the characteristics of a noncapital sentencing (*People v. Smith* (2005) 35 Cal.4th 334, 374), and little would be added by further discussion of the point.

There is no merit to the argument (AOB 466-472) that a valid death penalty scheme must ensure that a criminal defendant can commit capital murder, and yet do so in a manner which could not be argued as aggravating at the penalty selection phase. (See *Tuilaepa v. California, supra*, 512 U.S. 967, 976-980; *People v. Stitely, supra*, 35 Cal.4th 514, 574.)

Likewise rejected must be the argument (AOB 473-476) that his death sentence violates international law. (See *People v. Brown* (2004) 33 Cal.4th 382, 403-404.)

Finally, appellant's argument that the existence of 21 or 23 prior asserted errors makes his death sentence a violation of international law (AOB 477-488) falters with the lack of its premise.

Appellant's challenges must be denied.

CONCLUSION

Accordingly, respondent respectfully asks this Court to affirm the judgment.

Dated: July 14, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 51188 words.

Dated: July 14, 2005

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Morris Solomon, Jr.** No.: S029011

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 15, 2005, I served the attached RESPONDENT'S BRIEF by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P. O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 15, 2005, at Sacramento, California.

_____

Declarant